(18)

No. 00-191-CFX Title: Federal Election Commission, Petitioner
v.
Colorado Republican Federal Campaign Committee

Docketed: August 7, 2000 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Aug 3 2000	Petition for writ of certiorari filed. (Response due September 6, 2000)
	Aug 3 2000	Appendix of petitioner filed.
	Sep 6 2000	Brief of respondent Colorado Republican Federal Campaign Committee in opposition filed.
	Sep 20 2000	DISTRIBUTED for Conference of October 6, 2000
	Sep 26 2000	Reply brief of petitioner Federal Election Commission filed.
	Oct 10 2000	Petition GRANTED. SET FOR ARGUMENT February 28, 2001. **********
	Nov 16 2000	Order extending time to file petitioner's brief on the merits to and including December 1, 2000.
	Nov 17 2000	Order extending time to file respondent's brief on the merits to and including January 12, 2001.
	Dec 1 2000	Joint appendix filed.
	Dec 1 2000	Brief of petitioner Federal Election Commission filed.
	Dec 1 2000	Brief amicus curiae of National Voting Rights Institute filed.
	Dec 1 2000	Brief amici curiae of John F. Reed, et al. filed.
	Dec 1 2000	Brief amici curiae of Common Cause and Democracy 21 filed.
	Dec 1 2000	Brief amici curiae of Paul Allen Beck, et al. filed.
	Dec 1 2000	Brief amici curiae of Missouri, et al. filed.
	Jan 11 2001	Brief amicus curiae of Missouri Republican party filed.
	Jan 12 2001	Brief of respondent Colorado Republic Federal Campaign Committee filed.
	Jan 12 2001	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jan 12 2001	Brief amicus curiae of National Republican Congressional Committee filed.
	Jan 12 2001	Brief amicus curiae of California Republican Party filed.
	Jan 18 2001	CIRCULATED.
	Jan 19 2001	Reply brief of petitioner Federal Election Commission filed.
	Feb 8 2001	Record filed.
	Feb 28 2001	ARGUED.

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No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a political party has a First Amendment right to make unlimited campaign expenditures in coordination with the party's congressional candidates, notwithstanding the limits on such coordinated expenditures imposed by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

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In the Supreme Court of the United States

No.

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Election Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-53a) is reported at 213 F.3d 1221. The opinion of the district court (App. 54a-91a) is reported at 41 F. Supp. 2d 1197. An earlier opinion of this Court in this case (App. 92a-142a) is reported at 518 U.S. 604. An earlier opinion of the court of appeals (App. 143a-162a) is reported at 59 F.3d 1015. An earlier opinion of the district court (App. 163a-180a) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 441a(d) of Title 2, United States Code, provides in pertinent part:

> (d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election camp. .gn of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> * * * * *

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of —
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

STATEMENT

1. This case involves the application of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* (FECA or Act), to the campaign spending of political parties. The Act imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1000 to any federal candidate, and multicandidate political committees no more than $5000, with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A).

Since its decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court has recognized a "funda-

mental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (*NCPAC*); see also *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *Nixon* v. *Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 903-904 (2000). In *Buckley*, the Court upheld the FECA's limitations on contributions, finding that they serve a compelling government interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; see *id.* at 23-38. The Court struck down the Act's restrictions on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47; see *id.* at 39-59.

The instant case involves a category of payments commonly known as "coordinated expenditures," see *Buckley*, 424 U.S. at 46, which involve direct interaction with the candidate (or her agents) but do not involve a transfer of funds to the candidate herself. The FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the

purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or her agents "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i).[1] See *Buckley*, 424 U.S. at 46 ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA").

The FECA authorizes the national and state committees of a political party to make coordinated expenditures on behalf of their federal candidates well in excess of the contribution limits that apply to other entities. 2 U.S.C. 441a(d)(1); see H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"). In elections for the United States Senate, Section 441a(d) initially authorized each national or state party committee to expend the greater of $20,000 or 2 cents multiplied by the voting age population of the State in which the election is held. 2 U.S.C. 441a(d)(3)(A). That limit is periodically adjusted for inflation. 2 U.S.C. 441a(c). By 1996, the coordinated party expenditure limit for the Senate election in

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[1] "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

Colorado had increased to approximately $171,000. C.A. App. 332. If a state party committee chooses not to make the coordinated expenditures that Section 441a(d) permits, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-43 (1981) (*DSCC*).

2. The instant case arises out of an enforcement action filed by petitioner Federal Election Commission (FEC or Commission) against respondent Colorado Republican Federal Campaign Committee.[2] The gravamen of the enforcement action was that respondent's payment for an advertisement attacking the voting record of Tim Wirth—at that time a candidate for the Democratic nomination for United States Senator—was an "expenditure" within the meaning of the FECA. App. 144a-145a, 164a-166a. Under the FEC's interpretation of the statute, that expenditure was conclusively presumed to be coordinated with the Republican Party's candidate for the Senate, on the theory that political party committees were deemed to be "incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1; see App. 105a-106a (518 U.S. at 619-620). Because respondent had previously

[2] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, 437g. Congress has authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437d(a)(6); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

assigned its entire Section 441a(d) coordinated expenditure authority to the National Republican Senatorial Committee, the FEC found probable cause to believe that respondent had violated the FECA limits on coordinated expenditures. App. 147a-148a.

Respondent contested the enforcement action. It also asserted a counterclaim, arguing that Section 441a(d)(3) is facially violative of the First Amendment. The district court dismissed the enforcement action, holding that the payment at issue was not subject to the FECA limits because it was not made "in connection with" any federal election. See App. 166a, 171a-180a. The court declined to address respondent's First Amendment challenge. App. 166a, 180a. The court of appeals reversed, holding that the payment was subject to (and violative of) the FECA cap on party coordinated expenditures, and that the cap was constitutional. App. 143a-144a, 149a-162a.

3. This Court reversed, sustaining respondent's challenge to the FEC's enforcement action while declining to adjudicate respondent's counterclaim. App. 92a-142a (518 U.S. 604 (1996)) (*Colorado I*).

a. Three Justices concluded that the payment in question was properly regarded as an "independent" rather than a "coordinated" expenditure because the Chairman of the Colorado Republican Party had approved the advertisement and had consulted only with party officials. See App. 98a-100a (518 U.S. at 613-614) (Breyer, J., joined by O'Connor and Souter, JJ.). The plurality noted that under *Buckley* restrictions on independent campaign expenditures are presumptively violative of the First Amendment. App. 100a-101a (518 U.S. at 614-615). The plurality found no justification for subjecting political parties to restrictions on independent spending that could not constitutionally be

imposed upon other entities. App. 101a-105a (518 U.S. at 615-619). The plurality rejected the government's contention that expenditures made by a political party in support of its candidates can be conclusively presumed to be coordinated. App. 105a-110a (518 U.S. at 619-623).

The plurality declined to consider the argument, raised in respondent's counterclaim, that the FECA limits on political party expenditures are unconstitutional even as applied to expenditures that are in fact coordinated with the candidate. See App. 110a-114a (518 U.S. at 623-626). The plurality explained that neither the parties' briefs nor the opinions of the lower courts had focused on that question. App. 111a (518 U.S. at 624). It also observed that because many party coordinated expenditures are "virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)," App. 111a (518 U.S. at 624), "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits," App. 112a (518 U.S. at 625). In the plurality's view, the difficulty of the constitutional question and the parties' failure to focus on it "provide[d] a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question." App. 113a (518 U.S. at 625).

b. Four Justices would have struck down the FECA limits on party expenditures even as applied to expenditures that are in fact coordinated with the candidate. See App. 114a-119a (518 U.S. at 626-631) (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part);

App. 119a-140a (518 U.S. at 631-648) (Thomas, J., joined in part by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part). Two Justices would have upheld the Commission's enforcement action. App. 140a-142a (518 U.S. at 648-650) (Stevens, J., joined by Ginsburg, J., dissenting).[3]

4. The case was remanded to the district court for further consideration of respondent's counterclaim. On remand, the district court granted respondent's motion for summary judgment and declared the FECA limits on party expenditures unconstitutional. App. 54a-91a. The court stated that "[t]he only permissible purpose for limitations on campaign expenditures is to prevent corruption or the appearance thereof." App. 79a. It concluded that "[g]iven the purpose of political parties in our electoral system, a political party's decision to support a candidate who adheres to the [party's] beliefs is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt to exert improper influence." App. 87a-88a.

5. The court of appeals affirmed. App. 1a-53a.

a. The court of appeals stated that "[f]rom the birth of this republic into the 21st century, political parties

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[3] After this Court's decision in *Colorado I*, the Commission initiated a rulemaking proceeding and sought public comments to consider, *inter alia*, possible criteria for determining when spending by parties is coordinated. See Independent Expenditures and Party Committee Expenditure Limitations, 62 Fed. Reg. 24,367 (1997) (proposing revisions to 11 C.F.R. Pts. 100, 104, 109, 110 (proposed May 5, 1997)). Although that part of the rulemaking had been held in abeyance pending ongoing litigation, the Commission solicited further public comments in December 1999. 64 Fed. Reg. 68,951-68,952, 68,955 (1999). The FEC has not yet proposed a final rule on that subject.

have provided the principal forum for political speech and the principal means of political association." App. 13a. The court concluded that "the premise of [the FEC's] theory, namely that political parties can corrupt the electoral system by influencing their candidates' positions, gravely misunderstands the role of political parties in our democracy." App. 20a. It stated that "[p]olitical parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates. * * * Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process." App. 21a-22a (internal quotation marks omitted). The court concluded that the challenged FECA provision "constitutes a significant interference with the First Amendment rights of political parties," App. 24a (internal quotation marks omitted), and that "[t]he FEC has not demonstrated * * * that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process," App. 25a.

b. Chief Judge Seymour dissented. App. 26a-53a. She stated that the panel majority had "create[d] a special category for political parties based on its view of their place in American politics, a view at odds with history and with legislation drafted by politicians." App. 26a-27a. Chief Judge Seymour explained that Section 441a(d) reflected Congress's effort to balance competing interests by "permitting [parties] to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others," App. 38a, without leaving party expenditures wholly unconstrained. See App. 38a-39a. Chief Judge Seymour concluded that "*[a]s a matter of common*

sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics. Moreover, the majority is not at liberty to substitute its judgment for that of Congress on how best to balance the need to promote the role of political parties and to combat its potential for corruption." App. 50a (footnote omitted).

REASONS FOR GRANTING THE PETITION

Congress has limited the amounts of money that an individual or political committee may contribute to a candidate for federal office. Congress has expressly provided, moreover, that expenditures made in coordination with the candidate will be treated as contributions. This Court has sustained the FECA's limits on campaign contributions against constitutional attack, and it has approved the application of those limits to coordinated expenditures.

Recognizing the distinctive role that political parties have come to play in our system of government, Congress has authorized party committees to make coordinated expenditures in amounts much greater than the limits that apply to other donors. The court of appeals nevertheless struck down those higher limits, holding that political party committees have a First Amendment right to make *unrestricted* coordinated expenditures in support of candidates for federal office. The court's decision disregards the principle, lying at the core of the FECA, that a federal elected official should not be unduly beholden to a single source of financial support. The court of appeals' ruling sets aside the balance struck by Congress on a matter peculiarly within the legislative competence, and it threatens substantial disruption of the statutory scheme. Review by this Court is therefore warranted.

A. As the dissenting judge in the court of appeals explained, Congress "recognize[d] the role political parties play in American politics and accorded them special treatment by permitting them to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others." App. 38a (Seymour, J., dissenting). Congress has declined, however, to provide political parties a complete exemption from the contribution limits that apply to other donors. As the dissenting judge observed, "determining which measures suitably balance the nurture of political parties and the prevention of their use as tools of corruption is a matter for the legislative rather than the judicial process." App. 39a (Seymour, C.J., dissenting); see *Nixon* v. *Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments."); cf. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (*NRWC*) (Congress's "careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference").

The court of appeals struck down the FECA limits on campaign expenditures by political parties, holding that the parties have an unrestricted First Amendment right to spend money in support of, and in coordination with, candidates for federal elective office. In so doing, the court rejected the balance struck by Congress on a question that is peculiarly within the legislative competence. The court of appeals' "exercise of the grave power of annulling an Act of Congress," *United States*

v. *Gainey*, 380 U.S. 63, 65 (1965), warrants review by this Court.[4]

B. The court of appeals' decision has far-reaching consequences. Respondent's counterclaim asserted that "the First Amendment forbids the government to limit [respondent's] coordinated expenditures. The FEC's attempts and intent to impose or enforce any limit on such coordinated expenditures are unconstitutional, unlawful, and void." C.A. App. 28; see *id.* at 29 (requesting "[a] declaratory judgment pursuant to 28 U.S.C. § 2201 that [respondent] has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void."). The district court agreed, entering a declaratory judgment "that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against [respondent]." App. 91a. The court of appeals affirmed, holding that "§ 441a(d)(3)'s limit on party spending is not closely drawn to the recognized governmental interest but instead constitutes an unnecessary abridgment of First Amendment freedoms." App. 25a-26a (internal quotation marks omitted). Thus, the effect of the court of appeals' decision is that respondent's coordinated expenditures in support of candidates for federal office are subject to no FECA limitation whatever.

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[4] In 1988 Congress eliminated most of this Court's mandatory appellate jurisdiction. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662. The legislative history of that enactment, however, reflects the understanding that "[u]nder usual circumstances any lower Federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review." H.R. Rep. No. 660, 100th Cong., 2d Sess. 9 (1988).

The concept of a "coordinated expenditure" covers a variety of financial arrangements between a candidate and her supporters, many of which are functionally and constitutionally indistinguishable from direct contributions to candidates for federal office. The Court in *Buckley* recognized the need "to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. at 46. It explained that because "such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act," the FECA's "contribution ceilings * * * prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 46, 47. Citing *Buckley*, the plurality in *Colorado I* observed that "many [coordinated] expenditures are * * * virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)." App. 111a (518 U.S. at 624); see also App. 112a (518 U.S. at 625) (noting that "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits").

Under the court of appeals' decision, political party committees within the Tenth Circuit may now employ "the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." *Buckley*, 424 U.S. at 46. That holding effectively exempts party committees within the Tenth Circuit from the FECA contribution limits, and it significantly undermines the operation of the federal statutory scheme. Review by this Court is

warranted in light of the substantial practical effect of the court of appeals' decision.

C. The court of appeals' decision is incorrect.

1. This Court in *Buckley* upheld the FECA's $1000 limit on contributions to candidates for federal office, finding it justified by the compelling government interest in preventing both the fact and the appearance of political corruption. See 424 U.S. at 23-30. The Court has repeatedly referred, with apparent approval, to that aspect of the *Buckley* Court's analysis. See *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986); *NRWC*, 459 U.S. at 208; *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 196-197 & n.16 (1981) (plurality opinion). Most recently, the Court in *Shrink Missouri* relied on *Buckley* in upholding Missouri's $1000 limit (adjusted for inflation) on contributions to candidates for statewide office. See 120 S. Ct. at 903-910. The Court distinguished *Colorado I*, noting that in that case "the issue in question was limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits." *Id.* at 907.

2. As we explain above, see pp. 4-5, 14, *supra*, Congress has determined that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, * * * shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). This Court has recognized that the statutory limits on coordinated expenditures are an essential means of preventing circumvention of the FECA's contribution caps. See pp. 14-15, *supra*. The Court has not attempted to define the full range of circumstances under which a campaign expenditure may properly be treated as

"coordinated." The instant case, however, involves a facial challenge, in which respondent successfully requested a declaratory judgment that it "has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void." C.A. App. 29. Respondent is not entitled to that relief unless the FECA limits on party coordinated expenditures are unconstitutional even as applied to expenditures that are the functional equivalent of direct contributions.[5]

3. The First Amendment does not entitle respondent to an exemption from the FECA limits on coordinated expenditures.

a. This Court's decisions upholding campaign contribution limits have "recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink Missouri*, 120 S. Ct. at 905.

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[5] As the Court explained in *NEA* v. *Finley*, 524 U.S. 569, 580 (1998),

> [f]acial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973); see also *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail, [the plaintiff] must demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See *Broadrick, supra*, at 615.

See also *Hill* v. *Colorado*, 120 S. Ct. 2480, 2498 (2000), ("speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications") (internal quotation marks omitted). The FECA statutory limit on party coordinated expenditures "contemplates a number of indisputably constitutional applications." *Finley*, 524 U.S. at 584.

The effective operation of democratic government is threatened if public officials are, or appear to be, unduly influenced by the preferences of large-scale contributions. See *id.* at 905-906. The Court in *Shrink Missouri* reviewed the available evidence and found "little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 908.

Congress was entitled to conclude that large coordinated expenditures by political parties, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office. Congress was well aware of the valuable functions performed by political parties in the American system of government. As the Court in *DSCC* observed, "effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party." 454 U.S. at 42. Presumably for that reason, Congress did not subject political parties to the same limits on campaign contributions that it established for other persons and organizations, but instead fixed limits in Section 441a(d) that are higher by many thousands of dollars.[6]

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[6] The Act imposes a $1000 contribution limit per election for individuals and a $5000 limit for multicandidate political committees, and the limits are not indexed for inflation. 2 U.S.C. 441a(a)(1)(A) and (2)(A). Section 441a(d) establishes much higher basic limitations on coordinated expenditures by party committees and, pursuant to 2 U.S.C. 441a(c), those limits are adjusted periodically to take into account increases in the Consumer Price Index. For example, in 1996 the coordinated party expenditure limitation for the Senate election in Colorado was approximately $171,000. C.A. App. 332. Under the Act, moreover, the national and state

"[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history [of Section 441a(d)] demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." App. 104a (*Colorado I*, 518 U.S. at 618) (plurality opinion).

Congress declined, however, to leave coordinated spending by political parties wholly unconstra ned. Congress's determination that *some* campaign spending by political parties would have salutary effects does not undermine its determination that *unlimited* coordinated expenditures pose the same danger—*i.e.*, the risk of actual or perceived "improper influence" (*Shrink Missouri*, 120 S. Ct. at 905) based on financial largesse—as unrestricted campaign contributions generally.

Thus, respondent's First Amendment challenge to Section 441a(d) necessarily depends on the proposition that political parties have a preferred constitutional status vis-a-vis individuals or other organizations. The relevant historical evidence provides no support for that contention. Commenting on the political beliefs of men like Washington, Adams, Madison, Hamilton, and Jefferson, the historian Richard Hofstadter has written: "If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." Richard Hofstadter, *The Idea of a Party System* 3 (1970). Indeed, the Founders viewed political parties as a potential threat to representative governance and

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committees of a political party may *each* spend up to the statutory limit. See 2 U.S.C. 441a(d)(3).

consciously devised a constitutional framework designed to restrain their power. See The Federalist No. 10 (J. Madison) (Jacob E. Cooke ed., 1961).

b. The court of appeals did not question the proposition that party coordinated expenditures may be used as a means of influencing a legislator's performance of his official responsibilities. The court concluded, however, that because the essential function of parties is to facilitate the election of candidates who will implement the party's platform—a function that necessarily involves efforts to influence the behavior of the candidate once he has been elected to office—the exercise of such influence through coordinated spending cannot properly be regarded as a form of "corruption." See App. 22a ("Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process.") (internal quotation marks omitted).

The court of appeals' analysis underestimates the potential for abuse inherent in large-scale spending by political parties, and it misconceives the underlying justification for contribution limits generally. The premise of the FECA contribution caps is not that a private person's "influence" with government officials is per se illegitimate. Rather, the premise is that such influence should not be based on large infusions of *money*. That judgment applies with full force to coordinated expenditures directed by political party officials.

i. "In the nature of things, a [party] committee must act through its employees and agents." *DSCC*, 454 U.S. at 33. Even when party funds are raised from a large number of contributors, small groups of people may have de facto control over the manner in which those funds are spent. As a result, candidates who benefit

from large coordinated expenditures will likely feel indebted not to the party as an abstract entity, but to the individual party officials who cause those expenditures to be made. Party leaders may thereby acquire the ability to induce the candidates (once elected or re-elected) to take actions favorable to the leaders' own private interests or policy preferences. There is no reason to believe that such individuals are immune from the corrupting temptations and self-interest of other persons. To the contrary, history demonstrates that individual officials of political organizations are particularly well-situated to exert a corrupting influence upon candidates and officeholders in order to advance their private interests. See generally, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 88 n.4 (1990) (Stevens, J., concurring); *Igneri* v. *Moore*, 898 F.2d 870, 876 (2d Cir. 1990) (State may enact legislation to deter party officials from "capitalizing on their special relationships" with public officials to "curry[] favor for themselves and their associates").

ii. If party committees were permitted to make unlimited coordinated expenditures in support of candidates for federal office, the party could serve in effect as a conduit for contributions by individuals or political action committees, thereby facilitating evasion of other FECA contribution limits. Thus, an individual or political action committee that has already contributed the maximum $1000 or $5000 directly to the candidate could contribute additional amounts to one or more party committees,[7] and could in various ways com-

[7] Although an individual can contribute no more than $1000 per election to a candidate for federal office, she can contribute up to $5000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political committee operated by a national political party. 2 U.S.C. 441a(a)(1)(A)-(C). A political action committee can contribute no more than $5000 per election directly to a candidate for federal office. 2 U.S.C. 441a(a)(2)(A). Such an organization can contribute additional sums of up to $15,000 to a political committee established by a national political party, and up to $5000 to a state political party committee. 2 U.S.C. 441a(a)(2)(B) and (C).

municate the expectation that all or part of those sums would be used for coordinated expenditures in support of the candidate. Assuming that the candidate were aware of the nexus between the contribution to the party and the party coordinated expenditures,[8] that sequence of payments would create the very danger that the underlying contribution limits are intended to prevent—*i.e.*, the fact or appearance of "improper influence" resulting from payments to "politicians too compliant with the wishes of large contributors." *Shrink Missouri*, 120 S. Ct. at 905.[9]

[8] As the district court recognized, evidence submitted by the FEC in this case indicates that "party committees keep track of the Member of Congress who is responsible for contributions to the campaign committees," and that "[m]any, although not all, Members of Congress raise money on behalf of the party from contributors who have already given the maximum permissible amount to the individual candidate's campaign." App. 65a. The evidence further indicates that "the parties take into consideration the fund-raising efforts of candidates in deciding allocations of campaign funds," and that "[c]andidates in need of funding do request assistance and attempt to lobby those with control over allocations." App. 66a. See also App. 46a (Seymour, C.J., dissenting) ("Senators are expected to encourage their major donors, who have maximized their contribution to the candidate, to make contributions to the state or national party, which in turn gives the candidates money for their campaigns.").

[9] As early as 1924, one Senate leader explained that

> one of the great political evils of the time is the apparent hold on political parties which business interests and certain organi-

The court of appeals suggested (App. 23a) that concerns regarding the possible circumvention of other FECA limits could adequately be addressed through "[v]igilant enforcement of [2 U.S.C.] § 441a(a)(8)," which provides that contributions "earmarked or otherwise directed through an intermediary or conduit" shall be treated as contributions to the candidate herself. This Court has previously recognized, however, that the earmarking provision of Section 441a(a)(8) does not provide a complete response to the danger that contributions to political committees may be used to evade the FECA limits on contributions to candidates. In *Buckley*, the Court upheld the FECA's $25,000 annual aggregate limit on individual contributions, despite the fact that it imposed "an ultimate restriction upon the number of candidates and committees with

zations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.

United States v. *United Automobile Workers*, 352 U.S. 567, 576-577 (1957) (quoting 65 Cong. Rec. 9507-9508 (1924) (Sen. Robinson)). As the dissenting judge below recognized, the current FECA limits on party coordinated expenditures reflect "longstanding Congressional concerns that have animated the history of efforts to reform federal election financing, many of which were addressed to the evils arising from large contributions to political parties that put the parties in political debt to the donors, debts which were often paid by the parties' candidates." App. 44a (Seymour, C.J., dissenting).

which an individual may associate himself by means of financial support." 424 U.S. at 38. The Court explained that the $25,000 aggregate limit was "a corollary of the basic individual contribution limitation" that restricts the possibility of evasion "by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.* See also *California Med. Ass'n*, 453 U.S. at 198 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment).[10]

Under current federal law, moreover, an individual (or a corporation or union) may donate unlimited amounts of "soft money" to political parties. See App. 102a (*Colorado I*, 518 U.S. at 616) (plurality opinion). Because "soft money" cannot lawfully be spent to influence federal elections, the party cannot (even under the court of appeals' decision) use those donations to make coordinated expenditures on behalf of candidates for federal office. Large soft money donations may, however, be used to induce the party to make large coordinated expenditures with funds acquired from other ("hard money") sources. Those coordinated expenditures may in turn be used to induce elected officials to look favorably upon the soft money donor. The FECA limits on party coordinated expenditures

[10] As the dissenting judge in the court of appeals explained, "[t]he record [in this case] * * * reveals that although earmarking funds for a particular candidate is illegal, this prohibition is circumvented through 'understandings' regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote." App. 46a (Seymour, C.J., dissenting).

serve to break that chain, thereby helping to prevent circumvention of the statutory limits on individual contributions to candidates.

iii. As the foregoing analysis indicates, large party coordinated expenditures may be used to further the private interests either of individual party officials or of the party's major contributors. When party coordinated expenditures are employed towards those ends, they raise the very dangers that the FECA contribution limits are intended to address. But even when individual party leaders conscientiously seek to further the interests and values of the membership as a whole, Congress may legitimately choose to limit the extent to which large infusions of *money* may be used to achieve those objectives.

As the Court explained in *Shrink Missouri*,

> [i]n speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," [the Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind [the Court's] recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28). Congress's authority to "address the power of money 'to influence governmental action'" (*ibid.*) does not depend on the motivation of the donor. The wealthy individual who pays a large sum as an explicit *quid pro quo* for a legislator's vote is guilty of bribery, whether the payor has a pecuniary or similar tangible interest in

the passage or defeat of the proposed legislation, or instead is motivated solely by ideological concerns. With respect to methods "less 'blatant and specific' than bribery" (*ibid.*), Congress may similarly conclude that the undue influence of large campaign contributions upon public policy is inherently subversive of democratic governance, regardless of the donor's motives.

In invalidating the FECA's limits on party coordinated expenditures, the court of appeals "reject[ed] the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process." App. 22a (internal quotation marks omitted). By defining the issue in that manner, the court of appeals attacked a straw man. The justification for Section 441a(d) is not that party leaders should be prevented from exerting influence over the official behavior of the party's candidates. Rather, the cap reflects the same premise as the FECA contribution limits generally—*i.e.*, that large infusions of money are an inappropriate *method* of influencing an officeholder's conduct.[11] That judgment is as applicable to political parties as to other potential donors.

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[11] Similarly, the justification for imposing contribution limits upon individuals or political action committees is not that persons outside the government should be prevented from exerting "influence" over federal policy. To the contrary, individuals have a constitutional right "to petition the Government for a redress of grievances," U.S. Const. Amend. I, and "to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The FECA limits on contributions made by individuals and political committees reflect the premise that a legislator's conduct should not be affected by an actual or anticipated infusion of *money* from a single source—not a suspicion of private influence per se. Congress's decision to treat

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2000

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large monetary contributions as a source of special concern is neither irrational nor constitutionally problematic.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 99-1211

FEDERAL ELECTION COMMISSION,
PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DEFENDANT-COUNTER-PLAINTIFF-APPELLEE

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE; COMMON CAUSE; DEMOCRACY 21; THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, AMICI CURIAE

[Filed: May 5, 2000]

OPINION

Before SEYMOUR, Chief Judge, TACHA, and KELLY, Circuit Judges.

TACHA, Circuit Judge.

Section 441a(d)(3) of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455, limits the amount of money a political party may spend in coordination with its

candidates for Congress. The Federal Election Commission (FEC) appeals the district court's ruling that this limitation violates the First Amendment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

We analyze § 441a(d)(3) within its statutory context. The Federal Election Campaign Act (FECA or "Act"), as amended in 1974, limited the amount of money that individuals, corporations, banks, labor organizations, political committees, (*e.g.*, political action committees, or PACs), and political parties could contribute to candidates for federal office. *See* 18 U.S.C. §§ 608, 610 (1970 ed. Supp. IV). The Act also imposed limits on the amount these groups—and the candidates themselves —could spend in connection with a campaign for federal office. *Id.*

Shortly after Congress amended FECA, the Supreme Court struck down many of the Act's expenditure limits as unconstitutional under the First Amendment's free speech and association guarantees. *Buckley v. Valeo*, 424 U.S. 1, 39-59, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*) (invalidating FECA provisions limiting (1) individual expenditures independent of a candidate's campaign, (2) a candidate's expenditure of personal funds, and (3) overall campaign expenditures); *see also Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S. Ct. 1459, 84 L.Ed.2d 455 (1985) (*NCPAC*) (invalidating FECA provision limiting independent expenditures by political committees).

However, the Court generally has upheld FECA's contribution limits. *Buckley*, 424 U.S. at 28, 29, 35-36, 96 S. Ct. 612 (finding constitutional the Act's limits on the amount individuals and political committees can contribute to a candidate for federal office); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 193-99, 101 S. Ct. 2712, 69 L.Ed.2d 567 (1981) (upholding limits on the amount individuals may contribute to political committees). Furthermore, the Supreme Court has recognized that "coordinated expenditures" qualify as contributions under FECA and, therefore, are subject to FECA's contribution limits. *Buckley*, 424 U.S. at 46-47, 96 S. Ct. 612; *NCPAC*, 470 U.S. at 492, 105 S. Ct. 1459. Thus, FECA's contribution limits apply not only when an individual or group contributes money directly to a campaign, but also when an individual or group contributes money indirectly by making expenditures coordinated with the campaign. *See* 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert with . . . a candidate . . . shall be considered to be a contribution to such candidate.").

As presently codified, the Act sets the following contribution limits: A "person" is entitled to contribute $1000 to a candidate "with respect to any election for Federal office;" $5000 in any calendar year to a political committee that is not established and maintained by a national political party; and $20,000 in any calendar year to the political committees of a national political party. 2 U.S.C. § 441a(a)(1). However, no person may make contributions totaling more than $25,000 in any year. *Id.* § 441a(a)(3). A "multicandidate political committee" (or PAC) may contribute $5000 to a candidate with respect to any federal election; $5000 in any

calendar year to any other political committee that is not established and maintained by a national political party; and $15,000 in any calendar year to the political committees of a national political party. *Id.* § 441a(a)(2).

National and state political parties meet FECA's definition of "multicandidate political committees." *See id.* § 441a(a)(4) (defining a "multicandidate political committee" as "a political committee . . . which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office"). Thus, political parties ordinarily would be subject to the above dollar limits. However, Congress recognized that parties are different than PACs. Consequently, Congress exempted political parties from the Act's general contribution limits and imposed substitute limits upon them. *Id.* § 441a(d)(1), (3). Section 441a(d)(3), known as the Party Expenditure Provision, provides that political parties "may not make any expenditure in connection with the general election campaign of a candidate for Federal office" which exceeds the greater of $20,000 or 2 cents multiplied by the voting age population of the state.[1] *Id.* § 441a(d)(3).

II.

The prior proceedings in this case have narrowed the issues we must decide. In January 1986, Timothy Wirth, then a Democratic Congressman from Colorado, announced that he would seek Colorado's open Senate

[1] A separate provision, § 441a(d)(2), limits party expenditures in connection with Presidential campaigns. Our analysis and holding apply only to party spending in connection with congressional races.

seat in November. Several months later, before the Democratic primary or the Republican convention, the Colorado Republican Federal Campaign Committee ("Colorado Party" or "Party") developed and aired a radio advertisement criticizing Wirth's voting record. In its quarterly report to the FEC, the Party classified the advertisement outlay as an operating expense instead of a § 441a(d)(3) expenditure. The Colorado Democratic Party filed an administrative complaint with the FEC, alleging that the Party's purchase of radio time was an expenditure in connection with the Senate campaign and exceeded § 441a(d)(3)'s spending limit. The FEC agreed with the Democratic Party and filed suit in district court against the Colorado Party.

On motion for summary judgment, the Party argued that the outlay did not fall within the Party Expenditure Provision because the Colorado Party did not develop the advertisement "in connection with" the campaign of any federal candidate. The Party also asserted a counterclaim, alleging that the Party Expenditure Provision violated its First Amendment rights of free speech and association. The district court narrowly interpreted § 441a(d)(3) as limiting only those expenditures that use "'express words of advocacy of election or defeat.'" *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993) (quoting *Buckley*, 424 U.S. at 44 n. 52, 96 S. Ct. 612). Under this statutory construction, the district court found that the provision did not cover the Wirth advertisement and entered summary judgement in favor of the Party. *Id.* at 1456-57. Because the court resolved the dispute on statutory grounds, it did not reach the Party's constitutional challenge. *Id.* at 1457.

On appeal, the FEC argued for a broader interpretation of the provision as limiting "expenditures depicting a clearly identified candidate and conveying an electioneering message." *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995). We agreed with the FEC and thus concluded that the advertisement was subject to the limits of the Party Expenditure Provision. *Id.* at 1023. We also reached the constitutional challenge and held that § 441a(d)(3) did not impermissibly burden the Party's First Amendment rights. *Id.*

The Supreme Court granted certiorari "primarily to consider the Colorado Party's argument that the Party Expenditure Provision violates the First Amendment either facially or as applied." *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 613, 116 S. Ct. 2309, 135 L.Ed.2d 795 (1996) (internal quotation marks and citation omitted) ("*Colorado I*"). Three members of the Court found the provision unconstitutional as applied to the expenditure at issue, and four other Justices joined in this judgment. *Id.* at 608, 116 S. Ct. 2309.[2]

Based on the summary judgment record before it, the plurality noted that the Colorado Party had developed

[2] The four Justices who concurred in the judgment also dissented in part, urging the Court to resolve the Party's facial challenge to § 441a(d)(3). *Colorado I*, 518 U.S. at 626, 116 S. Ct. 2309 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 631, 116 S. Ct. 2309 (Thomas, J., concurring in the judgment and dissenting in part). Chief Justice Rehnquist and Justice Scalia joined Justice Kennedy's opinion in full and Justice Thomas's opinion in part.

and approved the advertisement script independent of any candidate for Federal office. *Id.* at 613-14, 116 S. Ct. 2309. In fact, at the time the advertisement was placed, the Party had not yet selected a senatorial nominee. *Id.* Thus, the plurality concluded that the advertisement in question was an "independent expenditure," not a "coordinated expenditure" subject to the limits of § 441a(d)(3). *Id.* at 613, 116 S. Ct. 2309. As such, the expenditure was entitled to full First Amendment protection under controlling precedent. *Id.* at 614-15, 116 S. Ct. 2309 (citing *NCPAC*, 470 U.S. at 497, 105 S. Ct. 1459; *Buckley*, 424 U.S. at 19- 21, 96 S. Ct. 612).

Having found the provision unconstitutional as applied to this particular independent expenditure, the plurality declined to reach the broader question of whether the First Amendment forbids limits on coordinated expenditures by political parties. *Id.* at 623, 116 S. Ct. 2309. Instead, the Court remanded the case to the district court for further proceedings, noting that "to our knowledge, this is the first case in the 20-year history of the Party Expenditure Provision to suggest that in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment." *Id.* at 624, 116 S. Ct. 2309.

On remand, the parties compiled an extensive record, focusing exclusively on the novel constitutional question highlighted in *Colorado I*. On cross motions for summary judgment, the district court concluded that the FEC had "failed to offer evidence which demonstrates the compelling need for limits on political party coordinated expenditures." *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 41 F.

Supp. 2d 1197, 1213 (D. Colo. 1999).[3] The court therefore declared the Party Expenditure Provision unconstitutional and entered summary judgment in favor of the Party. *Id.* at 1213-14. This appeal followed.

III.

We review a decision granting summary judgment *de novo*, applying the same legal standard used by the district court. *Mesa v. White*, 197 F.3d 1041, 1043 (10th Cir. 1999). In First Amendment cases, "the *de novo* standard is appropriate . . . for the further reason that . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (internal quotation marks and citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

[3] The plurality in *Colorado I* noted that neither the parties nor the lower courts had "considered whether Congress would have wanted the Party Expenditure Provision's limitations to stand were they to apply only to coordinated, and not to independent, expenditures." 518 U.S. at 625, 116 S. Ct. 2309. Thus, the plurality directed the parties on remand to brief this "nonconstitutional ground for exempting party coordinated expenditures from FECA limitations." *Id.* at 625-26, 116 S. Ct. 2309. On remand, the Colorado Party argued that FECA's unconstitutional limit on a party's independent expenditures could not be severed from its limit on a party's coordinated spending. Thus, the Party insisted that § 441a(d)(3) must fail as a matter of statutory construction. The district court disagreed and found that the Party Expenditure Provision, as it applies to coordinated expenditures, remained in effect after *Colorado I*. 41 F. Supp.2d at 1207. On appeal, the parties raise only the constitutional question.

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Determining the standard of scrutiny appropriate for the constitutional analysis is more complicated than determining our standard of review. In *Buckley*, the Supreme Court referred generally to "the exacting scrutiny required by the First Amendment," 424 U.S. at 16, 96 S. Ct. 612, and added specifically "that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," *id.* at 15, 96 S. Ct. 612 (internal quotation marks and citation omitted). In *Colorado I*, the plurality concluded that the government must demonstrate a "compelling" interest to restrict the First Amendment freedoms of candidates and their supporters. 518 U.S. at 609, 116 S. Ct. 2309. Such language suggests "strict scrutiny" of campaign finance regulation in general.

However, the Supreme Court most recently revisited the standard of scrutiny as to campaign contribution limits in particular. *See Nixon v. Shrink Mo. Gov't PAC*, —— U.S. ——, 120 S. Ct. 897, 145 L.Ed.2d 886 (2000). In *Shrink Missouri*, the Court construed a state statute that limited each person to a contribution of $1000, adjusted for inflation, in support of candidates for various statewide offices. *Id.* at 901-02. The Court upheld the statute against a First Amendment challenge. In doing so, the Court recognized that the *Buckley* distinction between (permissible) restrictions on contributions and (impermissible) restrictions on expenditures implies that different types of FECA limits require different levels of justification. *Id.* at

903-04. Prior to *Shrink Missouri*, the Court had made this implied distinction explicit in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). The *Shrink Missouri* court thus restated the standard of scrutiny for contribution limits as follows:

> [U]nder *Buckley*'s standard of scrutiny, a contribution limit involving "significant interference" with associational rights could survive if the Government demonstrated that contribution regulation was "closely drawn" to match a "sufficiently important interest," though the dollar amount of the limit need not be "fine tun[ed]."

120 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 25, 30, 96 S. Ct. 612).[4]

In this case, we must determine whether the FEC can justify § 441a(d)(1)'s limit on coordinated expenditures by political parties. Since FECA treats coordinated expenditures as "contributions," 2 U.S.C. § 441a(a)(7)(B)(i), and the Court has recognized this statutory classification, *NCPAC*, 470 U.S. at 492, 105 S.

[4] We note that the Court appears internally divided over the appropriate level of scrutiny. *Compare Shrink Mo.*, 120 S. Ct. at 917 (Thomas, J., dissenting) (criticizing "the majority's refusal to apply strict scrutiny to contribution limits"), with *id.* at 911 (Breyer, J., concurring) (concluding that, in this case, "there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny'").

Ct. 1459, we apply the foregoing standard to our review of the Party Expenditure Provision.

However, we admit some difficulty in applying this standard to this particular contribution limit. As noted in *Shrink Missouri*, the Supreme Court has found in general that contribution limits bear "more heavily on the associational right than on freedom to speak." *Shrink Mo.*, 120 S. Ct. at 904. This finding rested in part upon the recognition that contribution limits ordinarily "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20, 96 S. Ct. 612. In the case of political parties, though, a limit upon the amount a party can spend in coordination with its candidates certainly entails more than a "marginal restriction" upon the party's free speech. Indeed, in the context of an election, a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties.[5] We therefore question whether the contribution/expenditure dichotomy which underlies the *Shrink Missouri* standard applies with equal force in this case. However, we need not resolve this question definitively because the Party Expenditure Provision fails even under the more deferential standard reformulated in *Shrink Missouri*.

[5] Notwithstanding the dissent's charge, we do not conclude that parties and their candidates share an identity of interest. We, like the plurality in *Colorado I*, will not assume any "metaphysical identity" between party and candidate. We simply make the common sense observation that limiting a party's speech through its identified candidates imposes more than a marginal restriction upon that party's First Amendment freedoms.

IV.

The *Buckley* court recognized the "prevention of corruption and the appearance of corruption" as "constitutionally sufficient justification[s]" for the regulation of campaign contributions. 424 U.S. at 25, 26, 96 S. Ct. 612. "[I]mproper influence" and "opportunities for abuse" go beyond bribery and "extend[ ] to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink Mo.*, 120 S. Ct. at 905.

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . [In enacting contribution limits] Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Id. at 26-27, 96 S. Ct. 612 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565, 93 S. Ct. 2880, 37 L.Ed.2d 796 (1973)).

Since *Buckley*, the Court has stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97, 105 S. Ct. 1459. While corruption or the appearance thereof are constitutionally

sufficient justifications, the FEC in this case must show that political parties through their spending authority corrupt or appear to corrupt the electoral process. The opportunity for corruption or its appearance is greatest when the political spending is motivated by economic gain. As discussed below, political parties are diverse entities, one step removed from the candidate, and they exist for noneconomic reasons. Much like an advocacy group, a party functions "to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *See Massachusetts Citizens for Life*, 479 U.S. at 259, 107 S. Ct. 616. Political parties have played a vital role in the American system of government.

> [A]stute observers[ ] all agree that the political party is—or should be—central to the American political system. Parties are—or should be—integral parts of all political life, from structuring the reasoning and choice of the electorate, through all facets of campaigns and seemingly all facets of the government, to the very possibility of effective governance in a democracy.

John H. Aldrich, *Why Parties: The Origin and Transformation of Political Parties in America* 18 (1995). From the birth of this republic into the 21st century, political parties have provided the principal forum for political speech and the principal means of political association. *See, e.g.*, Clinton Rossiter, *Parties and Politics in America* 1 (1960) (declaring that there is "[n]o America without democracy, no democracy without politics, and no politics without parties. . . ."). Political speech and association, unfettered by unneces-

sary government interference, are the lifeblood of a free and independent republic. We need only look to the struggling new republics of our time to confirm this principle.

In its FECA enactments, Congress certainly recognized the importance of parties. *See* H.R. Conf. Rep. No. 94-1057, at 58 (1976), 1976 U.S.C.C.A.N. 946, at 973 (acknowledging that political parties fulfill a "unique role in the political process"), S. Rep. No. 93-689, at 3, 7 (1974), 1974 U.S.C.C.A.N. 5587, at 5589, 5593 (declaring that political parties "serve as a legitimate pooling mechanism for private contributions to candidates in general elections" and concluding that "a vigorous party system is vital to American politics").

The Supreme Court likewise has acknowledged the role of the party. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-25, 109 S. Ct. 1013, 103 L.Ed.2d 271 (1989), [*sic*] *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15, 107 S. Ct. 544, 93 L.Ed.2d 514 (1986); *see also Davis v. Bandemer*, 478 U.S. 109, 144-45, 106 S. Ct. 2797, 92 L.Ed.2d 85 (1986) (O'Connor, J., concurring in the judgment) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change."). Indeed, all three branches of government, to an important extent, rely on the speech and associational functions of parties to assure the

orderly conduct of elections, appointments and governance in general.

In *Colorado I*, the plurality acknowledged that they "are not aware of any special dangers of corruption associated with political parties" in the context of independent spending. 518 U.S. at 616, 116 S. Ct. 2309. Remand has only confirmed that conclusion for this court in the context of coordinated spending. We are convinced that *Shrink Missouri*, decided during the pendency of this appeal, does not alter this conclusion. As we discuss later, *infra* note 9, *Shrink Missouri* involved a straightforward application of *Buckley* to uphold counterpart state contribution limits. The Court did not confront the more difficult issue of whether limits on coordinated spending by political parties are consistent with the First Amendment.

The FEC submits essentially three theories on how coordinated spending by political parties corrupts, or creates the appearance of corrupting, our electoral system. Were any of these theories valid, one would have to question why Congress permits any coordinated expenditures by political parties, let alone removes them from the Act's more restrictive limits. At a minimum, Congress has signaled that political parties are different than individuals and other organizations.

A.

The FEC first argues that contributors to a political party—individuals or PACs—can corrupt (or appear to corrupt) the political process through their influence over a party. Under this theory, a contributor gives so much money to a party that the party grows beholden

to the donor. The party then exercises its coordinated expenditure authority to either support or neglect those candidates who endorse or eschew the interests of the large contributor. By limiting the spending authority of a political party, the Party Expenditure Provision limits the financial leverage a party can exert on behalf of a generous donor.

To support this theory, the FEC submitted the declaration of former Senator Paul Simon and other evidence concerning meetings between party donors and federal officeholders. In his declaration, Simon describes a meeting of the Democratic Caucus where members discussed an amendment to a bill that was already before the House-Senate Conference Committee. Simon opposed the amendment because it had not passed through the typical committee hearing process. The amendment clearly benefitted one particular corporation, and Simon referenced published reports that this corporation had contributed $1.4 million in the last election cycle to incumbent members of Congress. One of Simon's senior colleagues spoke out in favor of the amendment, saying: "I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread." R. at 466.

This anecdote, along with the FEC's other evidence, might say something about corporate influence over the legislative process. But this evidence does not demonstrate that parties undermine the integrity of the electoral process. Corporate giving may indeed influence legislators, and Congress recognized this danger in enacting FECA. *See, e.g., Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209-10, 103 S. Ct. 552, 74 L.Ed.2d 364 (1982) ("[FECA] reflects

a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."). Consequently, corporations may not make contributions or expenditures in connection with any federal election, 2 U.S.C. § 441b(a), and PACs organized by such corporations are subject to strict dollar limits, *id.* § 441a(a)(2).

The FEC may find these limits inadequate to eliminate all corporate sway over members of Congress. If so, this argument should be addressed to Congress, not to this court in this case. We will not validate limits on the protected speech of a political party as a back-door means of stemming corporate involvement in the legislative process. *See Massachusetts Citizens for Life*, 479 U.S. at 265, 107 S. Ct. 616 ("Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.").

To overcome a constitutional challenge, the FEC must demonstrate that a restriction on coordinated expenditures by political parties is "closely drawn" to match important government interests. *Shrink Mo.*, 120 S. Ct. at 904 (internal quotation marks and citation omitted). However, many of the interests identified by the FEC are hardly vindicated by this restriction. For example, the party may become an independent power source, seek contributions from interest groups and attempt to influence members' votes regardless of any limitation on coordinated expenditures. After all, *Colorado I* confirms that a party may make unlimited expenditures independent of its candidates. Moreover, as the district court observed, many of the activities the

FEC wishes to curtail are consistent with our model of representative democracy. *Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d at 1210-13.

The FEC insists that we must also consider the corrupting influence of corporate, bank and union money contributed to political parties outside of FECA's limits, so-called "soft money" contributions. In the parlance of campaign finance, FECA regulates only "hard money." Hard money is the common term for the limited and disclosed funds parties raise from individuals and PACs in conformity with the FECA limits outlined in the opening section. Parties may use only hard money to expressly advocate the election or defeat of federal candidates, and corporations, national banks and labor organizations cannot make hard money contributions to political parties. 2 U.S.C. § 441b(a).

FECA does not regulate so-called "soft money" contributions. An individual or group may contribute unlimited amounts of soft money to a political party. However, the party may use soft money only for limited activities, such as electing candidates for state office, *see id.* § 431(8)(A)(i), or for voter registration and "get-out-the-vote" drives, *see id.* § 431(8)(B)(xii). Thus, unregulated soft money contributions may not be used to influence a federal campaign, except through the limited party-building activities specifically designated in the statute.

The FEC contends that large soft money donors purchase influence over a political party, and the Party Expenditure Provision must be maintained to ensure that a party does not pressure its candidates to heed this influence. We appreciate the FEC's concern over soft money, but this proceeding does not present the

opportunity for soft money reform. In this case, we address only the constitutionality of § 441a(d)(3)'s limit on hard money coordinated expenditures. The FEC has presented no evidence to suggest that parties have illegally utilized soft money for hard money spending. Absent such a showing, we will not allow the appearance of soft money excess to justify a limit on hard money expenditures.[6]

B.

The FEC next contends that unscrupulous party officials can utilize the party's coordinated spending authority to further their personal interests or those of an unrepresentative party faction. Under this theory, the cap on coordinated expenditures limits the party

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[6] As part of its evidence below, the FEC submitted newspaper articles and editorials concerning soft and hard money. The district court did not make an evidentiary ruling on any individual article, but it did make general comments concerning the admissibility and weight of the articles. *See, e.g., Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d at 1200 ("The FEC makes numerous factual assertions, for example, based on reports in newspaper articles. Except as otherwise noted, the discussion which follows simply ignores the mass of irrelevant and/or inadmissible evidence in the record. . . ."). It appears to us that the district court considered all the submitted evidence, while acknowledging evidentiary weaknesses therein. Thus, we also consider the full record before us. We note, however, that media accounts documenting a vague (though visceral) public cynicism about campaign finance prove too little. We should not allow generic public dissatisfaction to support the restriction of political speech. *See NCPAC*, 470 U.S. at 499-500, 105 S. Ct. 1459 (concluding that "newspaper articles and polls purportedly showing a public perception of corruption" fall "far short" of the required evidence to justify a limitation on the independent expenditures of PACs).

elite from corrupting (or appearing to corrupt) the electoral process through improper pressure upon its own candidates. The FEC submits evidence that a small group of incumbent officeholders controls coordinated spending decisions, and certain incumbents have utilized this power to support candidates in their home states.

This theory, unlike the first, has the appeal of directly targeting the source of alleged corruption. If party elites corrupt the electoral process, then a limit on coordinated spending directly curtails one means of this alleged corruption. However, the premise of this theory, namely that political parties can corrupt the electoral system by influencing their candidates' positions, gravely misunderstands the role of political parties in our democracy.[7]

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[7] The dissent mischaracterizes the object of our criticism. According to the dissent, we accuse Congress of undervaluing the role of the party. This is simply not true. As we noted earlier, *supra* Part IV, Congress has recognized the party's unique role in the political process. The plurality in *Colorado I* found that the legislative history of FECA "rather than indicating a special fear of the corruptive influence of political parties . . . demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." 518 U.S. at 618, 116 S. Ct. 2309.

The object of our criticism is the FEC. Defying this clear congressional intent, the FEC argued before this court that Congress limited a party's coordinated expenditures out of a fear of corruption. The Supreme Court in this case has suggested otherwise. "[T]his Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." *Id.*

> To state the matter with utmost simplicity: political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually—or organizationally— powerful.

Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* 133 (1970). Political parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates. Parties are simply too large and too diverse to be corrupted by any one faction. Evidence in the record demonstrates that the parties' hard money comes from individual donors who give, on average, less than $40. As *amici* recognized in *Colorado I*, the old rule of sanitary engineers applies here: the solution to pollution is dilution. *Amicus Curiae Br. of the Committee for Party Renewal, Colorado I*, 518 U.S. 604, 116 S. Ct. 2309, 135 L.Ed.2d 795 (1996) (No. 95-489).

We therefore do not take issue with Congress on this point but rather reject the FEC's *post hoc* rationalization for this particular provision.

Nevertheless, in construing an enactment of Congress, we must necessarily review some judgments made by the legislative body. But that, of course, is our fundamental duty. *See Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). We are mindful of the need for deference to Congress in this particular arena and appreciate the dissent's repeated reminders on this count. However, such deference must ultimately give way to our constitutional obligation.

Even if, as the FEC contends, party leaders subvert the greater will of the rank-and-file membership, we trust the members to replace their leaders. It is true that political parties have been involved in wrongdoing, dating back to the Tammany Hall machine. However, the electoral and litigation processes have always managed to right these wrongs. Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes "a subversion of the political process." *NCPAC*, 470 U.S. at 497, 105 S. Ct. 1459.

C.

Finally, the FEC contends that the Party Expenditure Provision must be upheld to prevent evasion of the Act's other contribution limits. For example, an individual may contribute only $1000 directly to a candidate for federal office, 2 U.S.C. § 441a(a)(1)(A), but may contribute up to $20,000 of hard money to a national political party, *id.* § 441a(a)(1)(B). The FEC claims that if the coordinated expenditure limit is struck down, individuals will circumvent the $1000 limit by contributing $20,000 to a political party with the expectation that this money be used to support a particular candidate.

The Supreme Court has recognized that certain contribution limits serve to protect the integrity of others. *CMA*, 453 U.S. at 198-99, 101 S. Ct. 2712; *Buckley*, 424 U.S. at 38, 96 S. Ct. 612. We agree with the FEC that if an individual used the party as a conduit to channel money to specified candidates, this would certainly threaten the integrity of the individual contribution limit. However, Congress evidently foresaw this avenue of abuse and foreclosed it. The Act provides that individual "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit" to a particular candidate shall be treated as contributions from the original source to the candidate. 2 U.S.C. § 441a(a)(8); *see* 11 C.F.R. § 110.6(b)(1) (2000) (defining "earmarked" as any "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution being made to . . . a clearly identified candidate").

Under this provision and its expansive agency interpretation, the FEC certainly has the authority to ensure that individuals do not use political parties to circumvent the Act's other contribution limits. Vigilant enforcement of § 441a(a)(8), rather than a severe abridgement of party speech, is a more appropriate and direct means to safeguard the integrity of the individual contribution limits.[8]

V.

We recognize that the Supreme Court typically has upheld limits upon political contributions and that FECA treats coordinated expenditures by a political

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[8] We profess some confusion at the dissent's analysis on this point. The dissent maintains that § 441a(a)(8) operates only as a disclosure provision, and that disclosure alone is a partial measure that may be supplemented with valid contribution ceilings. We agree that disclosure is only a partial measure, but § 441a(a)(8) does not stop at disclosure. All earmarked contributions must be disclosed, and such contributions are then subject to the strict contribution ceilings under the Act. Thus, while § 441a(a)(8) does provide for disclosure, this disclosure then triggers enforcement of the concomitant individual contribution limit upheld in *Buckley*.

party as contributions. However, in this case, a simple cubbyholing of constitutional values under the labels "contribution" and "expenditure" cheapens the currency. *See, e.g., National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 429, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (stating that the government "cannot foreclose the existence of constitutional rights by mere labels"). We also recognize that the *Buckley* court was concerned about the "real or imagined coercive influence of large financial contributions on candidates' positions." *Id.* at 25, 96 S. Ct. 612. But the *Buckley* court so defined corruption for the purpose of reviewing limits upon giving and spending by individuals, PACs and candidates. Because the *Buckley* litigants did not challenge the Party Expenditure Provision on First Amendment grounds, the Court said nothing about the First Amendment implications of restricting party speech on behalf of its candidates. *Id.* at 58 n. 66, 96 S. Ct. 612. To encompass political parties within the *Buckley* language on corruption would require a real extension of this precedent. Such an extension is not warranted by the Court's post-*Buckley* FECA jurisprudence and would betray the historic importance of political parties. *See Colorado I*, 518 U.S. at 629, 116 S. Ct. 2309 (Kennedy, J., concurring in the judgment and dissenting in part) ("In my view, we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending.").

In sum, we conclude that the Party Expenditure Provision constitutes a "significant interference" with the First Amendment rights of political parties. *Buckley*, 424 U.S. at 25, 96 S. Ct. 612 (internal quotation

marks and citation omitted). This interference effects more than a "marginal restriction upon the [parties'] ability to engage in free communication." *Id.* at 20, 96 S. Ct. 612. The FEC has not demonstrated on remand that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process.[9] Therefore, § 441a(d)(3)'s limit on party spend-

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[9] The dissent contends that we betray the evidentiary threshold applied in *Shrink Missouri*. As the dissent accurately recounts, the *Shrink Missouri* court did caution against too rigorous an evidentiary standard in the context of campaign finance. However, those words of caution must be read in light of the particular challenge before the Court in that case. The state provision before the Court in *Shrink Missouri* limited each person to a contribution of $1000, adjusted for inflation, in support of candidates for various statewide offices. The Court found that this provision bore a "striking resemblance to the limitations sustained in *Buckley*." *Shrink Mo.*, 120 S. Ct. at 908. As a consequence, the Court ultimately concluded that "[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case." *Id.* at 910. Since the case "d[id] not present a close call," the Court declined any "further definition" of the government's evidentiary obligation. *Id.* at 907. However, the Court did indicate that there might be "need for a more extensive evidentiary documentation if petitioners had made any showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence." *Id.* at 908. In our judgment, the Colorado Party has amply demonstrated that the evidence before the *Buckley* court is largely inapposite to the constitutionality of this provision. As noted earlier, the *Buckley* litigants did not challenge the Party Expenditure Provision on First Amendment grounds. Therefore, the Court said nothing about the First Amendment implications of restricting party speech through its candidates.

The *Shrink Missouri* court essentially incorporated by reference the *Buckley* evidence, because the disposition amounted to a routine application of the *Buckley* precedent. As we have demonstrated, this case does not involve a routine application of

ing is not "closely drawn" to the recognized governmental interest but instead constitutes an "unnecessary abridgment" of First Amendment freedoms.[10] *Id.* at 25, 96 S. Ct. 612.

AFFIRMED.

SEYMOUR, Chief Judge, dissenting.

The majority opinion is fundamentally flawed in several aspects. First, the discussion and analysis are permeated with and skewed by the majority's determination to substitute its judgment for that of Congress on quintessentially political matters the Supreme Court has cautioned courts to leave to the legislative process. In so doing, the majority creates a special category for political parties based on its view of their place in American politics, a view at odds with history and with legislation drafted by politicians. The majority

Buckley. Therefore, it was incumbent upon the FEC to make a more extensive evidentiary showing, which they failed to do.

[10] In *Colorado I*, the plurality indicated that the more restrictive limits upon coordinated spending by a "multicandidate political committee," *see* § 441a(a)(2), would apply to political parties if the entire Party Expenditure Provision were struck down. 518 U.S. at 625, 116 S. Ct. 2309. Heeding this signal from the Court, the Party on remand challenged all FECA limits to the extent they restrict coordinated spending by political parties. The district court did not strike § 441a(a)(2) as applied to political parties, and we decline to do so as well. The record contains no evidence of a credible threat by the FEC to enforce this provision against political parties. Therefore, this particular issue is not ripe for our resolution. *See Renne v. Geary*, 501 U.S. 312, 321-22, 111 S. Ct. 2331, 115 L.Ed.2d 288 (1991) (finding no justiciable controversy in a First Amendment political speech case where there was "no factual record of an actual or imminent application" of the challenged provision).

supports its decision to accord political parties an exemption from contribution limits Congress believed necessary to protect the integrity of the democratic political process by discounting the type of evidence the Supreme Court has recently held sufficient to substantiate congressional concerns, and by relying instead on evidence the Court has expressly discounted. Accordingly, I respectfully dissent.

I

As originally enacted, the Federal Election Campaign Act (FECA or the Act), 2 U.S.C. §§ 431-455, placed limits on both political contributions and expenditures. The primary interest to be served by these limitations was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976). In *Buckley*, the Supreme Court was faced with First Amendment challenges to several sections of FECA and drew a distinction for purposes of First Amendment analysis between expenditures and contributions. The Court viewed limits on expenditures as a direct restraint on political speech but characterized contribution limits as entailing only a marginal restriction. Accordingly, the Court upheld the $1000 limit on contributions by individuals and groups to a particular candidate or authorized campaign committee for any single election, *id.* at 23-35, 96 S. Ct. 612,

the $5000 limit on contributions by a political committee to a single candidate, *id.* at 35-36, 96 S. Ct. 612, and the $25,000 limit on total annual contributions by an individual, *id.* at 38, 96 S. Ct. 612.

The Court reached a different result with respect to limits on expenditures and held unconstitutional the $1000 limit on independent expenditures for communications advocating the election or defeat of an identified candidate. *Id.* at 39-51, 96 S. Ct. 612. The Court also struck down the ceiling on a candidate's personal expenditures as unsupported by the governmental interest in preventing actual and apparent corruption, *id.* at 51-54, 96 S. Ct. 612, and invalidated that section of the Act limiting overall campaign expenditures by candidates for federal office, *id.* at 54-58, 96 S. Ct. 612.

As indicated by *Buckley*, FECA regulates two types of expenditures: those that are coordinated with a candidate and those that are made independently. Coordinated expenditures are considered contributions under section 441a(a)(7)(B)(i) and therefore may be subject to limits not permissible with respect to independent expenditures. Prior to the Supreme Court ruling in this case, *see Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 116 S. Ct. 2309, 135 L.Ed.2d 795 (1996), the FEC had construed FECA as requiring that all party expenditures be deemed coordinated.

The instant appeal concerns section 441a(d)(3),[11] a provision of the Act not at issue in *Buckley*, which limits the amount a committee for a political party can spend in connection with the general election campaign of a candidate for federal office. The expenditure at issue was made by the Colorado Republican Federal Campaign Committee for a radio advertisement criticizing an announced Democratic candidate that aired before either party had actually nominated senatorial candidates. In line with the FEC's position, the district court in its original opinion held that the expenditure was coordinated even though no Republican candidate had been nominated at the time. Nonetheless the court ruled that the expenditure did not violate the Act, holding that because it did not constitute express advocacy, it was not made "in connection

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[11] That section provides:

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds-
>
> (A) in the case of a candidate for election to the office of Senator or of Representative from a State which is entitled to only one Representative, the greater of-
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

2 U.S.C. § 441a(d)(3).

with" the Republican candidate within the meaning of section 441a(d)(3). *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993).

On appeal, this court disagreed and held that section 441a(d)(3) applied to coordinated spending that involved a clearly identified candidate and an electioneering message without regard to whether the message constitutes express advocacy. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995). We further held that the limit imposed by the section on coordinated expenditures did not violate the First Amendment.

In a fractured opinion, the Supreme Court vacated and remanded. *See Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 116 S. Ct. 2309, 135 L.Ed.2d 795. The plurality opinion of Justice Breyer, joined by Justices O'Connor and Souter, rejected the FEC's argument that all expenditures by political parties must be deemed coordinated, and held that the expenditure here was in fact independent and that a limit on independent expenditures by political parties was unconstitutional under *Buckley*. In so doing, the plurality emphasized "the fundamental constitutional difference" between independent expenditures and contributions to a candidate to be spent on his campaign. *Id.* at 614-15, 116 S. Ct. 2309. The plurality held that the government's interest in preventing corruption and the appearance of corruption was not sufficient to justify the restriction on independent spending, observing that while the danger of a political *quid pro quo* was not eliminated, that danger was alleviated by the absence of prearrangement and coordination. The

plurality did not reach the issue of whether FECA's limit on coordinated expenditures by political parties is facially invalid under the First Amendment, pointing out that the issue had not been adequately developed in the lower courts.

Justices Kennedy, Rehnquist, Scalia, and Thomas agreed with the plurality but would have gone further to hold the spending limit invalid as applied to all expenditures, independent and coordinated. Justice Thomas, standing alone, also advocated the abandonment of the analysis in *Buckley* altogether. Justices Stevens and Ginsburg dissented on the ground that all money spent by a political party should be deemed a contribution to the campaign and that FECA's limits on spending by political parties are constitutional.

On remand, this court determined that factual evidence might be relevant to the issues yet to be determined and sent the case back to the district court for further proceedings. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 96 F.3d 471 (10th Cir. 1996). The district court held the Act's limits on all spending by political parties facially invalid. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d 1197 (D. Colo. 1999). In so doing, the court referred to the material supplied by the FEC in support of the constitutionality of section 441a(d)(3) as lacking "any attention to elementary evidentiary requirements, such as authentication (Fed. R. Evid. 901), or evidentiary limitations, such as the rule against hearsay (Fed. R. Evid. 801)." *Id.* at 1200. Accordingly, the court "simply ignore[d] the mass of irrelevant and/or inadmissible evidence in the record and recite[d] facts which [it]

regard[ed] as having some significance to the questions before the court." *Id.* at 1200-01. The court held that under the standard established by the Supreme Court, the FEC must demonstrate that the limit serves a compelling interest and is narrowly tailored. *Id.* at 1208. The court further held that the FEC had failed the test because it had offered no evidence of *quid pro quo* corruption, stating that mere access does not constitute corruption.

II

While the appeal of this district court ruling was pending, the Supreme Court decided a case addressing contribution limits at the state level that were based on the "proposition that large contributions raise suspicions of influence peddling tending to undermine citizens' confidence 'in the integrity of . . . government.'" *Nixon v. Shrink Missouri Gov't PAC*, —— U.S. ——, ——, 120 S. Ct. 897, 902, 145 L.Ed.2d 886 (2000) (quoting *Shrink Missouri Gov't PAC v. Adams*, 5 F. Supp.2d 734, 738 (E.D. Mo. 1998)). In upholding the contribution limits at issue, the Court addressed several issues relevant to the instant appeal. The Court's analysis thus requires more than the perfunctory nod given it by the majority.

In *Shrink Missouri* the Court addressed the standard applicable to a claim that a contribution limit violates the First Amendment and reiterated the line it had drawn in *Buckley* between limits on expenditures and limits on contributions as they impact speech rights. *Shrink Missouri*, 120 S. Ct. at 903. Significantly, as the majority grudgingly acknowledges, the Court reaffirmed and expanded on *Buckley*'s distinction

> between expenditure and contribution limitations *in their impacts on the association right.* While an expenditure limit "precludes most associations from effectively amplifying the voice of their adherents," (thus interfering with the freedom of the adherents as well as the association) the contribution limits "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."

Id. at 903-04 (citations omitted) (emphasis added). The Court reiterated and expressly applied to associational rights its holdings that "'restrictions on contributions require less compelling justification than restrictions on independent spending,'" *id.* at 904, and that "a contribution limit involving 'significant interference' with associational rights could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest,'" *id.* (citations omitted).

The Court in *Shrink Missouri* also addressed the governmental interest furthered by contribution limits. The Court reiterated its prior cases holding that preventing corruption and the appearance of corruption are constitutionally sufficient to justify the abridgement of the associational right, pointing out that "[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves *or infusions of money into their campaigns.*" *Shrink Missouri*, 120 S. Ct. at 905 (quoting *Federal Election Comm'n v. National Right to Work*

Comm., 459 U.S. 197, 208, 103 S. Ct. 552, 74 L.Ed.2d 364 (1982)) (emphasis added).

> In speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money to "influence government action" in ways less "blatant and specific" than bribery.

Id. (quoting *Buckley*, 424 U.S. at 28, 96 S. Ct. 612). The Court observed that there is "no serious question" about the legitimacy of the governmental interest in preventing corruption and its appearance. *Id.*

The Court then addressed and rejected the lower court's conclusion that the state had "fail[ed] to justify the invocation of those interests with empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence." *Id.* at 906. The Court's discussion of the requisite evidentiary showing is directly relevant here in view of the majority's conclusion that the FEC has failed to meet its burden with respect to the contribution limit before us. The Court began its analysis by pointing out:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates

> that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible. The opinion noted that "the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem [of corruption] is not an illusory one."

Id. (quoting *Buckley*, 424 U.S. at 27 & n. 28, 96 S. Ct. 612). The Court also rejected the argument that the evidentiary showing held sufficient in *Buckley* had subsequently been supplemented by a new requirement that the government "demonstrate that the recited harms are real, not merely conjectural." *Id.* at 907. In so doing, the Court distinguished between independent expenditure limits and contribution limits, implying that because limits on contributions are directly related to preventing corruption they may be assumed to be necessary absent convincing evidence to the contrary. *Id.*

The Court then set out the evidence supporting the contribution limit in that case, which did "not present a close call" requiring further definition of the state's evidentiary obligation. *Id.* This evidence consisted of an affidavit from a state lawmaker stating that "large contributions have the real potential to buy votes," *id.* (internal quotation omitted), newspaper reports of large contributions, and anecdotal evidence, as well as a statewide vote indicating a public perception that limits were necessary. *Id.* at 907-08. The Court acknowledged that more extensive documentation might be needed if the state had made a showing

> to cast doubt on the apparent implications of *Buckley*'s evidence and the record here, but the closest respondents come to challenging these

> conclusions is their invocation of academic studies said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates' positions. . . . Given the conflict among these publications, and the absence of any reason to think that public perception has been influenced by the studies cited by respondents, there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.

Id. at 908.

III

An evaluation of the majority's analysis in light of *Shrink Missouri* reveals that the majority opinion is replete with instances in which Congressional assessments and priorities are criticized and disregarded based on the majority's view of the role political parties should play in the American political process and how best to promote that role. The majority accepts, as it must, that the prevention of both corruption and the appearance of corruption is a legitimate justification for impinging on First Amendment rights. Nonetheless the majority essentially eviscerates that interest by reweighing the balance struck by Congress in order to elevate what the majority believes to be the paramount interest political parties have in making unlimited coordinated contributions.

In my judgment, the majority has crossed the line between assessing the legal merits of a First Amendment challenge and imposing its own political judg-

ments. A court owes "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized." *Shrink Missouri*, 120 S. Ct. at 906 n. 5. "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments. . . ." *Id.* at 912 (Breyer, J., concurring). "[T]he legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process." *Id.* at 913.

Rather than deferring, the majority substitutes its view for that of Congress and levels a broad-based attack on the contribution limit at issue. It concludes that the FEC has failed to provide adequate evidentiary support for the limit, that in imposing the limit Congress "gravely misunderst[ood] the role of political parties in our democracy," maj. op. at 1231, that the provision cannot be supported as a necessary component in the overall regulatory scheme, and that the same result can be obtained by the less intrusive reporting requirements of section 441a(a)(8). In so doing, the majority requires an improperly demanding level of proof from the FEC to support a contribution limit the Supreme Court has told us is presumably justified. The majority disregards evidentiary material expressly cited by the Court as sufficient to justify a contribution limit, yet relies on disputed academic articles of the type the Court expressly held insufficient to cast doubt on the validity of the justification. Finally, by immunizing political parties from contribution limits designed to prevent corruption, the majority ignores the Court's

directive that courts not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Shrink Missouri*, 120 S. Ct. at 906 n. 5.

The premise for the majority's result is its view of the "vital role" that political parties have played in the American system of government. Maj. op. at 1227-28. While there is no doubt that parties play an important role in American politics, there is also ample support for the legislative determination that if left unchecked, parties can exert a corrupting influence on democratic processes or, equally importantly, appear to do so.[12]

In formulating contribution limits, Congress did in fact recognize the role political parties play in American politics and accorded them special treatment by permitting them to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others, *see* 2 U.S.C. § 441a(d)(1), and by permitting adjustment for inflation, *see id.* § 441a(c). Indeed, the majority cites the legislative history accompanying these provisions as evidence of Congressional recognition that parties play a unique role in the political process. *See* H.R. CONF. REP. NO. 94-1057, at 58-59 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 973-74. However, other legislative material reveals that Congress wanted to ensure that "party assistance [would] actually represent[ ] the involvement of many voters and not merely the influence of a wealthy few." S. Rep. No. 93-689 (1974), *reprinted in* 1974

[12] Significantly, the majority offers no evidence to the contrary beyond passages from law review articles which contain platitudes about the abstract value of parties in the American political process.

U.S.C.C.A.N. 5587, 5594. The FECA amendments of 1974 were intended to "prevent[ ] evasion of the individual contribution limits by persons funneling large gifts through party committees; each person's donation to party funds used to assist federal candidates under this special provision must not exceed the maximum amount he could give directly to a candidate." *Id.*

Significantly, these Congressional remarks appear in a discussion of legislation intended to strengthen political parties by promoting the pooling of resources from many small contributors, building coalitions of voters, keeping candidates responsible to the electorate, and increasing party resources for important party operations between elections. *See id.* at 5593-94. Indeed, *Amici* Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee argue persuasively that during the past twenty years political parties have recovered dramatically from a prolonged period of decline due in large part to the FECA provisions limiting contributions and expenditures, which in turn encourage parties to deploy their resources in other party-building functions that ultimately enhance their role in the political process. Whether one accepts this argument or not, it clearly illuminates the fact that determining which measures suitably balance the nurture of political parties and the prevention of their use as tools of corruption is a matter for the legislative rather than the judicial process.

The majority prefaces its analysis with a discussion voicing reservations on whether the standard set out in *Shrink Missouri* for assessing contribution limits should apply to political parties. *See* maj. op. at 12-13.

Under that test, a contribution limit survives a First Amendment challenge if the Government demonstrates that it was closely drawn to match a sufficiently important interest. *Shrink Missouri*, 120 S. Ct. at 904. As an initial matter, the majority is simply mistaken in asserting that the Court in either *Buckley* or *Shrink Missouri* analyzed contribution limits more closely when they affected associational rights than when they affected speech rights. To the contrary, as discussed above, after setting out the *Buckley* analysis in the context of restraints on speech, the Court in *Shrink Missouri* expressly stated that it had "flagged a similar difference between expenditure and contribution limitations in their impacts on the association right." *Id.* While recognizing that contribution limits have a greater impact on associational rights than on speech rights, the Court nonetheless reiterated its past holdings that expenditure and contribution limits are governed by differing standards even when they affect associational rights. *Id.* It is beyond quibble that the Court has drawn a distinction for purposes of First Amendment scrutiny between expenditures and contributions, rather than between associational and speech rights.

Moreover, there is no support in the Constitution, this legislation, or Supreme Court authority for the majority's notion that political parties are entitled to favored treatment when assessing a contribution limit that impacts their associational rights. The majority supports its position by stating that "a party speaks in

large part through its identified candidates."[13] Maj. op. at 1227. The same can be said, however, of any entity seeking to associate itself with a political candidate. That fact therefore does not serve to set political parties apart from others subject to contribution limits. More importantly, the Supreme Court has expressly rejected the argument that a party and its candidate are identical: "We cannot assume . . . that this is so. Congress chose to treat candidates and their parties quite differently under the Act, for example, by regulating contributions from one to the other." *Colorado Republican Comm.*, 518 U.S. at 623-24, 116 S. Ct. 2309 (citation omitted). The Supreme Court and Congress have thus foreclosed the very assumption made by the majority here.

In holding the contribution limit at issue unconstitutional, the majority requires the FEC to provide evidence in support of Congress' determination that political parties corrupt or appear to corrupt the political process through unlimited contributions.[14] The Supreme Court addressed the quantum of evidence required to support this interest in *Shrink Missouri*,

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[13] In focusing on the speech a party can allegedly only make through its candidate, the majority blurs the very line it wishes to draw between limits on speech and limits on associational rights.

[14] In addition, the majority requires that Congress' determination be analyzed in light of the vital role political parties play in that process. As I have discussed in text, Congress was clearly aware of the role parties play in the political process, and it enacted measures aimed at promoting that role as well as strengthening parties in general. The majority thus "double counts" the importance of protecting political parties and improperly substitutes its balancing of the competing values at issue here for that of Congress.

and its discussion there cannot be squared with the majority's treatment of the matter here. The Court pointed out that the necessary evidentiary showing "will vary up or down with the novelty and plausibility of the justification raised," and that "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Shrink Missouri*, 120 S. Ct. at 906. Because the legitimacy of the interest is thus so critical to the evidence required, the relevant inquiry is whether the Court's discussion in *Shrink Missouri* of the well-recognized dangers of large contributions applies when those contributions are from political parties rather than from other donors.

In *Shrink Missouri*, the lower court accepted the argument that the State had not justified the invocation of this interest with empirical evidence of actually corrupt practices or the public perception of a corrupting influence. The Supreme Court disagreed and expanded on the dangers flowing from large contributions generally.

> In speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

Shrink Missouri, 120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28, 96 S. Ct. 612). The Court pointed out:

> Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and anti-gratuity statutes. While neither law nor morals equate all political contributions, without more, with bribes, we spoke in *Buckley* of the perception of corruption "inherent in a regime of large individual financial contributions" to candidates for public office, as a source of concern "almost equal" to *quid pro quo* improbity. The public interest in countering that perception was, indeed, the entire answer to the overbreadth claim raised in the *Buckley* case. This made perfect sense. Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

Id. at 905-06 (citations omitted).

The FEC contends that these concerns apply equally to large contributions from political parties, arguing that parties can use their ability to funnel large amounts into the campaigns of particular candidates in response to large donations by outside interests, to assist in the evasion of contribution limits placed on individual and political committee contributions, and to

promote the personal interests of party leaders, their friends, and party factions. The FEC's position voices long-standing Congressional concerns that have animated the history of efforts to reform federal election financing, many of which were addressed to the evils arising from large contributions to political parties that put the parties in political debt to the donors, debts which were often paid by the parties' candidates. In *United States v. International Union UAW-CIO*, 352 U.S. 567, 77 S. Ct. 529, 1 L.Ed.2d 563 (1957), for example, the Supreme Court addressed the circumstances giving rise to the Corrupt Practices Act, 18 U.S.C. § 610, which prohibited corporations and labor unions from making contributions or expenditures in connection with federal elections. The Court found the following legislative history indicative of Congressional intent to "protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power," *id.* at 582, 77 S. Ct. 529:

> We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.

Id. at 576-77, 77 S. Ct. 529 (quoting remarks by "Senator Robinson, one of the leaders of the Senate"). "We all know that money is the chief source of corruption. We all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation. . . ." *Id.* at 577-78, 77 S. Ct. 529 (quoting Senator Bankhead offering 1940 amendments to the Hatch Act restricting contributions to federal elections).

> One of the matters upon which I sensed that the public was taking a stand opposite to that of labor leaders was the question of the handling of funds of labor organizations. The public was aroused by many rumors of . . . political contributions to parties and candidates which later were held as clubs over the head of high Federal officials.

Id. at 579, 77 S. Ct. 529 (quoting Congressman Landis, author of 1943 measure extending sections of Corrupt Practices Act to labor unions). These remarks, all of which were made by federal legislators during the efforts to pass earlier campaign finance reform, establish that the dangers from large contributions by political parties are no more novel or implausible than those from large contributions generally.

The Court's analysis of the quantum of evidence presented in *Shrink Missouri* governs the inquiry here. In concluding that the evidentiary showing in that case was sufficient to justify the contribution limits challenged there, the Court cited an affidavit from a state legislator stating generally that large contributions have the potential to buy votes, and "newspaper accounts of large contributions supporting inferences of

impropriety." *Shrink Missouri*, 120 S. Ct. at 907. Although the majority largely ignores the record before us, it likewise contains affidavits and depositions from those who have been active in federal fund raising activities, both as candidates and as party activists. These materials state that large donors to political parties give with an eye toward obtaining favorable consideration of legislation they deem important or obtaining access to a legislator in order to urge favorable action. *See, e.g.*, Decl. of Robert Hickmott (DNC fundraiser), jt. app. at 452-53; Aff. of Robert Razen (staff person for Senator George Mitchell), *id.* at 462; Aff. of Former Senator Paul Simon, *id.* at 466; Decl. of Former Senator Timothy Wirth, *id.* at 545-46; Dep. of Paul Simon, *id.* at 636; Dep. of Timothy Wirth, *id.* at 649, 661. *See also* Fax from National Republican Senatorial Comm., *id.* at 626. The record also reveals that although earmarking funds for a particular candidate is illegal, this prohibition is circumvented through "understandings" regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote. *See, e.g.*, Decl. of Leon G. Billings (former Exec. Dir. of Dem. Sen. Campaign Comm.), *id.* at 382; Decl. of Robert Hickmott (DNC fundraiser), *id.* at 446-48; Aff. of Paul Simon, *id.* at 465; Decl. of Timothy Wirth, *id.* at 543; Dep. of Timothy Wirth, *id.* at 644-45.

Senators are expected to encourage their major donors, who have maximized their contribution to the candidate, to make contributions to the state or national party, which in turn gives the candidates money for their campaigns. *See, e.g.*, Decl. of Leon G. Billings, *id.* at 382-83; Decl. of Robert Hickmott, *id.* at 446-47; Aff.

of R. William Johnstone (staff person for Senator Wysche Fowler, Jr.), *id.* at 457; Decl. of Timothy Wirth, *id.* at 543; Dep. of Paul Simon, *id.* at 635. *See also* Letter from Congressman Wayne Allred, *id.* at 191. Former Senator Simon candidly admitted, "I have found the process to be corruptive for everyone and, even those of us who go out of our way to make sure money does not influence our decision, we are affected by it." *Id.* at 630; *see also id.* at 640 (noting one colleague saying bluntly, "We have to pay attention to who is buttering our bread.").

In addition, the record contains numerous media articles and interviews reporting on episodes in which the inference can be drawn that donations to a party brought about access to that party's candidates and legislators, which in turn furthered the donor's business interests.[15] *See generally id.* at 250-89. Given the

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[15] Despite the Court's explicit reliance on newspaper articles in *Shrink Missouri*, the majority here refuses to accord them any weight in addressing the Congressional goal of preventing public perception of corruption. The majority states that "media accounts documenting a vague (though visceral) public cynicism about campaign finance prove too little. We should not allow generic public dissatisfaction to support the restriction of political speech." Maj. op. at 1230 n. 6. In so doing, the majority mischaracterizes and then ignores the significance of the media material here, and fails to accord any weight to the public interest in countering the perception of impropriety, which the Supreme Court has described "as a source of concern 'almost equal' to *quid pro quo* improbity." *Shrink Missouri*, 120 S. Ct. at 905-06 (quoting *Buckley*, 424 U.S. at 30, 96 S. Ct. 612). Significantly, the Supreme Court authority upon which the majority relies was directed to evaluating limits on independent expenditures, which the Court has emphatically distinguished from coordinated expenditures.

Supreme Court's reliance on this very type of evidence in *Shrink Missouri*, I believe that we are required to credit it here and to hold that the FEC has indeed carried its evidentiary burden to support the legislative judgment that party contribution limits are necessary to prevent corruption and the appearance of corruption.

The majority opinion's several responses to the evidence offered by the FEC all run afoul of Supreme Court authority. First, the majority begins on the wrong foot in relying on a statement by the plurality opinion in *Colorado Republican Fed. Campaign Comm.* that it was "'not aware of any special dangers of corruption associated with political parties.'" Maj. op. at 1228 (quoting *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 616, 116 S. Ct. 2309). This remark was not directed to contribution limits on party donations. Rather, it referred to limits on a party's independent expenditures which, unlike contributions, are not deemed to be coordinated and therefore pass constitutional muster due to the absence of prearrangement and coordination. *Id.* This statement is simply inapposite to coordinated party contributions. Cf., *Shrink Missouri*, 120 S. Ct. at 907 (making same point about *Colorado Republican Fed. Campaign Comm.* with respect to government's evidentiary burden).

> [T]he constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.
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> *Colorado Republican Campaign Comm.*, 518 U.S. at 617-18, 116 S. Ct. 2309 (citing *Buckley*, 424 U.S. at 45-46, 96 S. Ct. 612; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 498, 105 S. Ct. 1459, 84 L.Ed.2d 455 (1985)). When, as here, this constitutionally significant fact is missing and the expenditure is instead coordinated, the Court has clearly indicated that a substantial danger of corruption may be assumed absent convincing evidence to the contrary. The majority thus errs in placing the burden on the FEC rather than on the Colorado Republican Party, which certainly has not shouldered that burden in this case.

Next the majority takes issue with Congress' decision to limit party contributions as a means of addressing the ability of corporations and other big donors to influence the legislative process. Here, too, the majority acts contrary to the admonition in *Shrink Missouri* that courts are not to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 120 S. Ct. at 906 n. 5. "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments . . ." *Id.* at 912 (Breyer, J., concurring). Given the legitimacy of the goal of preventing corruption and the undeniable fact that parties funnel funds from donors to candidates when they coordinate expenditures, the Supreme Court has made clear that we are not at liberty to replace Congress' judgment on an effective means for furthering its interest. *See Buckley*, 424 U.S. at 30, 96 S. Ct. 612 (court "has no scalpel" to probe Congressional choice of means to accomplish necessary end).

The majority also rejects the FEC's argument that limits on party contributions are necessary to prevent unscrupulous party officials from furthering their pet interests, thereby corrupting or appearing to corrupt

the legislative process. The majority posits that in adopting this theory, Congress "gravely misunderstands the role of political parties in our democracy." Maj. op. at 1231. *As a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics.*[6] Moreover, the majority is not at liberty to substitute its judgment for that of Congress on how best to balance the need to promote the role of political parties and to combat its potential for corruption. The majority also views the electoral and litigation processes as the proper means for righting the wrongs perpetrated by corrupt party leaders, again displacing the judgment of Congress on matters uniquely within its province.

Finally, the majority rejects the argument that limits on party expenditures are necessary to prevent evasion of the Act's other contribution limits. The majority

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[6] The majority apparently concedes the problem in accusing Congress of failing to understand the political process, and attempts to shift the focus of its criticism from Congress to the FEC, asserting that the FEC misunderstands Congressional intent in defending limits on coordinated party spending as a means of combating corruption. *See* Maj. Op. at 1231 n. 7. The Supreme Court language in *Colorado Republican Campaign Comm.*, upon which the majority relies, however, is found in its discussion of limits on independent party expenditures. *See* 518 U.S. at 616-18, 116 S. Ct. 2309. As I have previously pointed out, *see supra* at 1227 n. 5, the Court in that discussion specifically distinguished independent party spending from coordinated spending on the basis of the "constitutionally significant" "lack of coordination." 518 U.S. at 617, 116 S. Ct. 2309. The majority relies on selective quotations and simply ignores the fact that the Supreme Court analyses in which these quotes occur is grounded on the very distinction that renders the majority's reliance invalid.

believes that enforcement of the disclosure requirements in section 441a(a)(8) is adequate to protect against this problem. To the contrary, the Supreme Court has made it unmistakably clear that the existence of disclosure requirements is not a ground for invalidating contribution limits.

> We specifically rejected this notion in *Buckley*, where we said . . . that "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." We understood contribution limits, on the other hand, to "focu[s] precisely on the problem of large campaign contributions-the narrow aspect of political association where the actuality and potential for corruption have been identified-while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." There is no reason to view contribution limits any differently today.

Shrink Missouri, 120 S. Ct. at 908 n. 7.

In sum, the majority has substituted a paean to its view of the role of political parties for a properly deferential assessment of the constitutionality of limits on coordinated party contributions under applicable Supreme Court authority. The result the majority

reaches simply cannot be reconciled with that authority.

In my view, section 441a(d) is unquestionably valid under the analysis in *Shrink Missouri* and prior Supreme Court authority. The FEC has amply supported its argument that limits on coordinated expenditures by political parties serve the public interest in preventing both corruption and the appearance of corruption by limiting the leverage parties possess to pay off the political debts owed to large contributors. The FEC has offered evidence that the access purchased by large donations translates into power which distorts the democratic process. Both common sense and experience dictate that the public justifiably views the access obtained by large donations as the unfair opportunity to gain a candidate's support on the basis of financial considerations rather than on policy or belief. The FEC has also supported its contention that the limits at issue are an integral part of FECA's regulatory scheme because they prevent donors from evading the limits on contributions to a candidate by contributing to political parties with the understanding, tacit or otherwise, that the funds will be used for that candidate. Finally, the majority's conclusion that the limit here is not narrowly drawn rings hollow in light of the Court's earlier holding in this case that parties may make *independent* expenditures on behalf of a candidate.

I see no merit to the assertion that the political atmosphere has changed to the extent that the limits at issue are no longer needed. This evaluation, like so many of the others made by the majority in this case, is to be made by Congress through the legislative process

and not by us through judicial fiat. Neither the majority nor the Committee has made a persuasive argument that human nature has changed in the twenty years that have passed since FECA was enacted. To the extent that the political process has in fact improved, FECA has played a major role in the curtailment of abuses. Eliminating an integral part of the Act would allow those abuses to flourish once again. The fact that FECA has accomplished what it was meant to do is hardly a justification for doing away with it. In holding to the contrary, the majority makes a grave error by turning a deaf ear to the voices of history that advise us to learn from our mistakes lest we repeat them.

Accordingly, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. CIV.A.89 N 1159

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE, DEFENDANT

[Filed: Feb. 18, 1999]

MEMORANDUM OPINION AND ORDER

NOTTINGHAM, District Judge.

This case has come back to the court on remand from the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit. The only claim to have survived the gauntlet is a counterclaim asserted by Defendant Colorado Republican Federal Campaign Committee [hereinafter "Colorado Party"]. This counterclaim asserts a constitutional challenge to a provision of the Federal Election Campaign Act of 1971 [hereinafter "FECA"], *codified, as amended, at* 2 U.S.C.A. §§ 431-456 (West 1997 & Supp. 1998). The provision at issue, which the Supreme Court labeled for convenient reference as "the Party Expenditure Provision," [16] places limits on the amount of money which committees of political parties may expend "in connection with the general election campaign of candidates for Federal office." *See* 2 U.S.C.A. § 441a(d). The matter is now before the court on cross-motions for summary judgment. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1993).

FACTS

a. Procedural History

Plaintiff Federal Election Commission [hereinafter "FEC"] originally brought this action against the Colorado Party, asking the court to declare: (1) that the disbursement of money which the Colorado Party had made for certain political advertising should have been reported as an "expenditure," as FECA defines that term; and (2) that, had the disbursement been so reported, it would have violated the spending limitations set forth in the Party Expenditure Provision. In 1986, before the Colorado Republican Party had selected its candidate for the senatorial election to take place in the fall of 1986, the Colorado Party bought and aired campaign advertisements attacking Timothy Wirth, the putative candidate of the Democratic Party. The state Democratic Party complained to the FEC. The FEC agreed with the Democratic Party and brought this case.

Relying on previous Supreme Court language and interpretations by the FEC which, to the eye, suggested that political parties were by their nature

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[16] *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 611, 116 S. Ct. 2309, 2313, 135 L.Ed.2d 795 (1996).

incapable of making "independent" expenditures on behalf of candidates, this court found, as a matter of law, that the Colorado Party had made a "coordinated"[17] expenditure. *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F.Supp. 1448, 1452-53 (D.Colo.1993) (relying on *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28 n. 1, 102 S. Ct. 38, 40 n. 1, 70 L.Ed.2d 23 [1981] [hereinafter "*DSCC*"]; FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide [CCH] ¶ 5819 [July 18, 1985]; FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide [CCH] ¶ 5766 [Aug. 16, 1984]). The court then recognized that even a coordinated expenditure is only subject to the limitations of section 441a(d)(3) if it is made "in connection with" a general election campaign. In accordance with Supreme Court and federal circuits' previous interpretations, the court construed the phrase "in connection with" narrowly, as requiring "express advocacy." Thus, the court concluded that the advertisement aired by the Colorado Party did not constitute express advocacy, was not made "in connection with" a general election campaign, and did not run afoul of section 441a(d)(3). *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1455-57.

The Tenth Circuit reversed. *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995). The court adopted a definition of the phrase "in connection with" broader than the one used by this court. The Tenth Circuit's definition focused on whether the advertisement contained an "electioneering message" and targeted a clearly identifiable candidate. *Id.* at 1023. The Colorado Party's advertisement, according to the Tenth Circuit, contained such a message and identified Timothy Wirth as its focus. *Id.*

[17] The distinction between "independent" and "coordinated" expenditures is discussed beginning *infra* at 5.

The Supreme Court vacated the Tenth Circuit's opinion and remanded the case. The Court rejected the assumption made by both courts below—that political parties were, by definition, only able to make coordinated expenditures—and found, as matter of fact, that the expenditure in this case was an independent one. The Court then considered FECA's limitations on independent expenditures by political parties and deemed the limits unconstitutional. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. at 617-20, 116 S. Ct. 2309, 2317-18, 135 L.Ed.2d 795 (1996) [hereinafter "*Colorado I*"]. The Court did not resolve the Colorado Party's counterclaim—a facial challenge to the FECA limits on *coordinated* as well as *independent* expenditures. *Id.* at 623-24, 116 S. Ct. at 2319-20.

b. Legal and Factual Background

The provision at issue is section 441a(d), in particular as it applies to congressional elections. The statute provides as follows:

> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations

contained in paragraphs (2) and (3) of this subsection.

. . . . .

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(I) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

2 U.S.C.A. § 441a(d).[18] As I noted earlier, this provision establishes limitations on expenditures made "in connection with the general election campaign of candidates for Federal office."

[18] Section 441a(d) specifies that it applies to the national committee of a political party, state committees of a political party, and subcommittees of state parties. Throughout this Memorandum Opinion and Order, the court refers generically and interchangeably to political parties, parties, and party committees because the Colorado Party and the FEC have not suggested any relevant distinction between these entities, and none is apparent to the court.

Expenditures are divided into two categories: independent and coordinated. Coordinated expenditures are those which are made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C.A. § 441a(a)(7)(B)(I) (West 1997). Party committees work closely with candidates and campaigns in making coordinated expenditures.[19] (*See* FEC Facts ¶ 38; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 38.)

All other expenditures are independent. In order to make an independent expenditure, a party must be sufficiently distant from a candidate's campaign and a candidate's campaign strategies that it is able to skirt FECA's definition of a "coordinated" expenditure. *See*

[19] In 1996, the parties made coordinated expenditures as follows: $19,254,219 by the Republican Party committees (national, state, and local) and $15,843,754 by the Democratic Party committees (national, state, and local). (Federal Election Commission's Statement of Material Facts Not in Genuine Dispute, Submitted Under Seal ¶ 8 [filed Jan. 23, 1998] [hereinafter "FEC Facts"]; *admitted in pertinent part at* Def. Colorado Republican Federal Campaign Committee's Resp. to the FEC's Statement of Material Facts Not in Genuine Dispute, Submitted Under Seal ¶ 8 [filed Feb. 17, 1998] [hereinafter "Colorado Party's Resp. to FEC Facts"].) The three national Republican Party committees are the Republican National Committee ("RNC"), the National Republican Senatorial Committee ("NRSC"), and the National Republican Congressional Committee ("NRCC"). The three national Democratic Party Committees are the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC"), and the Democratic Congressional Campaign Committee ("DCCC").

Colorado I, 518 U.S. at 614-15, 116 S. Ct. at 2315. Following *Colorado I*, political parties may engage in unlimited independent expenditures on behalf of congressional candidates. *Id.* at 615, 116 S. Ct. at 2315.

The *Colorado I* Court declined, for "prudential" reasons, to consider whether coordinated party expenditures could constitutionally be limited by application of the Party Expenditure Provision. The Court therefore remanded the case for further factual and legal development. *Id.* at 623-25, 116 S. Ct. at 2319-20. The litigants have seized this opportunity to lard the summary judgment record with voluminous documentation and disputation concerning the admissibility and significance of that documentation. The FEC has been especially prone to supply material without any attention to elementary evidentiary requirements, such as authentication (Fed.R.Evid.901), or evidentiary limitations, such as the rule against hearsay (Fed. R. Evid. 801). The FEC makes numerous factual assertions, for example, based on reports in newspaper articles. Except as otherwise noted, the discussion which follows simply ignores the mass of irrelevant and/or inadmissible evidence in the record and recites facts which the court regards as having some significance to the questions before the court.

The money which flows to political parties is a crucial aspect of the dispute before the court. The term "hard" money or "federal" money means that money which may be raised in accordance with FECA limits, and is the only money which parties may spend on behalf of candidates for federal election. Parties may accept hard money only in limited amounts and from limited sources. The aggregate amounts which individuals may

give to federal candidates, and federal and state parties, may not exceed $25,000 per year to permissible recipients. 2 U.S.C.A. § 441a(a)(3). "Multicandidate political committees," most commonly referred to as political action committees or PACs, may give up to $15,000 per year to a national party and $5,000 per year to a state party, and such entities are not subject to an aggregate limit. 2 U.S.C.A. § 441a(a)(2). Except through their PACs, corporations and unions may not contribute money to be used in connection with federal elections. 2 U.S.C.A. § 441b(a).

In contrast to the limitations on the money which may be used in connection with federal elections, "soft" money is a term commonly applied to contributions to political parties which FECA does not regulate as to source or amount. "Soft" money may not be spent in connection with federal elections. It may, however, be used for non-federal-election activity, such as "get out the vote" campaigns, issue advocacy, and elections for state office.

In the labyrinth of federal election regulation, both types of money, hard and soft, may flow in all directions. Soft money and hard money may be exchanged. Various state parties have traded soft dollars for hard dollars, and state parties have made similar trades with national party committees.[20] In addition, national party

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[20] The FEC asserts that the exchanges were typically not dollar-for-dollar exchanges but, rather, reflected a premium for the higher value of hard dollars. (FEC Facts ¶¶ 43-48.) The Colorado Party admits only one exchange: the Texas Republican Party, needing federal (i.e., hard) funds late in the 1996 campaign swapped $35,000 in federal funds for non- federal funds (i.e., soft)

committees transfer hard monies to state and local party committees in accordance with 11 C.F.R. § 110.3(c)(1) (1997).[21] (*See* FEC Facts ¶ 19; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 19.) National parties may also transfer their own soft money to state parties. The national parties (the RNC, for example) report such activities to the FEC; the Colorado Party reports its non-federal money activity to the Colorado Secretary of State. (*See* FEC Facts ¶ 20; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶ 20.)

In addition to the transfer of money, party committees are permitted to—and do—share or transfer

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with the Colorado Republican Party. (FEC Facts ¶ 43; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 43.)

With respect to all of the FEC's other money exchange allegations—including those regarding premiums paid for hard money—the Colorado Party admits that such exchanges have been reported but disputes the truth of the matter reported and objects to the consideration of such evidence as "unreliable hearsay." (Colorado Party's Resp. to FEC Facts ¶¶ 44-48.) The FEC claims to be offering the assertions only for the fact that they were reported and not for the truth of the reported material. I do not understand how the mere reporting that a premium was paid for hard dollars is relevant in this case, and I therefore treat such assertions as inadmissible hearsay.

[21] For example, in the 1996 senate elections, the RNC transferred $166,068 to the Colorado Party. The Colorado Party used that money as an expenditure coordinated with the campaign of Wayne Allard. The parties dispute whether the Colorado Party would have made this expenditure without such a transfer. (FEC Facts ¶ 31; Colorado Party's Resp. to FEC Facts ¶ 31.) The coordinated expenditure limit for Colorado senate candidates in the 1996 election was almost $171,000. (FEC Facts ¶¶ 29-30; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶¶ 29-30.)

agency authority to other party entities. The transfer of such authority appears to have the same practical effect as the exchange of hard dollars for soft dollars. The transferee committee is then responsible for making expenditures under section 441a(d). (FEC Facts ¶¶ 21-22, 24-27, 34-37; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶¶ 21-22, 24-27, 34-37.)

The various party committees keep track of all this by maintaining separate accounts according to the use for which money may be expended. For example, the NRSC has a federal (i.e., hard money) account which it uses to support federal candidates and two non-federal (i.e., soft money) accounts which it uses for party-building activities. In particular, the NRSC focused in 1995 and 1996 on states with active senate races where party-building money would be of assistance. (FEC Facts ¶ 18; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶ 18.)

Because political parties do not have money of their own, they must raise funds from contributors. Money to be used for party expenditures on behalf of candidates is "generated through ongoing fund-raising operations that include direct-mail solicitations, telemarketing efforts, party fund raisers, an annual congressional dinner, and the solicitation of individual donors." (Statement of Undisputed Facts and Supporting Exs. ¶ 23, Ex. B [Corrado Report at 20] [filed Jan. 23, 1998] [hereinafter "Colorado Party Facts"]; *admitted at* Federal Election Commission's Resp. to the Colorado Party's Statement of Undisputed Facts and Supporting Exs. ¶ 23 [filed Feb. 17, 1998] [hereinafter "FEC's Resp. to Colorado Party Facts"].) According to

the Colorado Party, the "vast majority of the monies used for coordinated expenditures are generated through contributions of relatively small amounts from individual donors." (Colorado Party Facts ¶ 23, Ex. B [Corrado Report at 20].) The FEC refuses to admit that the "vast" majority of such funds are raised in the manner described. The evidence in the record, however—particularly the testimony of Haley Barbour, RNC Chairman from 1993 to 1997, former Congressman Tony Coehlo, DCCC Chairman from 1981 to 1986, and Jon Heubusch, Executive Director of the NRSC during the 1995-1996 election cycle—demonstrates that at least the majority of hard money received by the parties is in the form of small (i.e., less than $100) contributions from individual contributors. (*See* Joint Ex. Vols. II, Ex. G [Barbour Dep. at 23 ("[I]n the first couple of years I was Chairman I believe more than 70 percent of all our revenue came in contributions of $100 or less.")], Ex. J [Coehlo Dep. at 24, 36 (recognizing the value of direct mail which became the "major revenue source" based on contributions averaging $35)], Ex. M [Heubusch Dep. at 99] [filed Jan. 23, 1998].) These hard-money contributions overwhelmingly result from direct-mail solicitations at the national level, and from direct-mail and telephone solicitations at the state party level. (Colorado Party Facts ¶ 24; *admitted at* FEC's Resp. to Colorado Party Facts ¶ 24.)

The FEC offers almost forty factual allegations regarding candidate fund raising for parties. (FEC Facts ¶¶ 95-132.) Some of them are undisputed. With specific reference to the Colorado Party, the parties agree that Republican federal candidates and officeholders are asked to assist in fund raising. This assistance includes their attendance at fund-raising events

as a "draw" to other potential attendees, permission to identify the candidates and/or officeholders as co-hosts of fund raisers at which hard and soft money are raised, and signing a direct-mail fund-raising letter. (FEC Facts ¶ 122; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 122.)

In general, the evidence offered by the FEC indicates that candidates and officeholders raise funds for their parties in disparate ways. Members of Congress are encouraged by their party to transfer excess campaign funds to the party or a committee thereof and to help raise money for the party. (FEC Facts ¶¶ 96-100.) Further, the FEC highlights what is known as a "tally" system, whereby party committees keep track of the Member of Congress who is responsible for contributions to the campaign committees. Some candidates willingly raise money for the party and party committees; others are less committed to the parties' common pursuits, at least with respect to finances. (*See, e.g.*, FEC Facts ¶¶ 96, 97.) Some raise money for the party even when they are not themselves in an election, or when they otherwise have no expectation of receiving funds from the party in return for their efforts. (*See* FEC Facts ¶¶ 104, 120.) Other Members of Congress raise money for their party and, in turn, request that they receive assistance in the form of coordinated expenditures. (*See* FEC Facts ¶¶ 125, 126, 130, 131.) Many, although not all, Members of Congress raise money on behalf of the party from contributors who have already given the maximum permissible amount to the individual candidate's campaign. (FEC Facts ¶¶ 133-43.) Where fund raising is done in conjunction with a candidate, and the potential contributor has already contributed the maximum

amount directly to the candidate, the contributor is made aware that, although any contribution to the party would not go directly to the candidate, it would indirectly assist the candidate by assisting his or her party. (FEC Facts ¶¶ 103, 115, 132.) Parties also cultivate giving from PACs and encourage giving from PACs based on the performance of competing PACs. (*See* FEC Facts ¶¶ 83-86, 88-91, 93.)

The evidence offered by the FEC suggests that the parties take into consideration the fund-raising efforts of candidates in deciding allocations of campaign funds. (*See* FEC Facts ¶¶ 99, 101-03, 116, 118.) The evidence also indicates, however, that the primary consideration in allocating funds is which races are marginal—that is, which races are ones where party money could be the difference between winning and losing, (*see* FEC Facts ¶¶ 106, 109), assuming that a candidate is competent, exercises common sense, and acts professionally, (FEC Facts ¶ 7; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 7; *see also* FEC Facts ¶ 9). Maintaining party control over seats is paramount to the parties' pursuits. (*See, e.g.*, FEC Facts ¶¶ 222-223, 225.) Candidates in need of funding do request assistance and attempt to lobby those with control over allocations. (FEC Facts ¶ 106; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶ 106.)

The FEC makes numerous factual claims regarding where contributors to the political parties choose to make their donations and what they allegedly gain in return. In particular, the FEC highlights the various party-donor programs and the benefits and access to Members of Congress which a contributor gains by giving at various levels. (FEC Facts ¶¶ 50-65, 68-78,

161-210.) The FEC also suggests that, in exchange for financial support, contributors to party committees expect that party committees will intercede with candidates and officeholders on behalf of large contributors.[22] (FEC Facts ¶¶ 242- 81.) The evidence offered also addresses the fund-raising practices by which Members of Congress solicit money and existing donors are recruited to bring others into the donating fold. In some cases, contributors give money directly to a party committee instead of giving to a candidate if, for example, the contributor is a PAC and the candidate does not accept PAC contributions. (FEC Facts ¶ 144.) There is evidence that one reason contributors give to party committees after having given directly to a candidate is to help their candidate indirectly. (FEC Facts ¶¶ 135-37, 139.)

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[22] Of those allegations, fewer than ten even mention the name of a specific Member of Congress or Members of Congress in general. (FEC Facts ¶¶ 242-45, 247-48, 269.) The remainder involve party committee interactions with the White House or other parts of the executive branch. Further, many involve soft-money contributions. As with many other allegations by the FEC, these allegations are simply not relevant to the dispute before the court. Suggesting or arranging for meetings between party contributors and the President or Vice President or any other administration officials has no bearing on the constitutionality of limits on coordinated party expenditures. Even the FEC's allegations which do involve Members of Congress fail to even suggest that coordinated party expenditures result in quid pro quo corruption or the appearance thereof. Further, the fact that Senator Wirth, for example, was asked to meet with large donors to the party with whom he had not previously met, (*see* FEC Fact ¶ 243), offers no support for the FEC's position. If anything, the evidence suggests that party committees who attempted to arrange meetings for donors with legislators were kept from doing so by staff, where such a meeting would be "inappropriate." (FEC Facts ¶ 242.)

The FEC contends that party committees exert influence over candidates.[23] (FEC Facts ¶¶ 211-41.) The FEC's evidence includes newspaper articles alleging that party leaders have suggested withholding campaign funds from candidates if they refuse to adopt a particular policy position. *See* FEC Facts ¶¶ 234, 238-39; Federal Election Commission's Supplemental Statement of Material Facts Not in Genuine Dispute ¶ 307 [filed Feb. 17, 1998] [hereinafter "FEC Supplemental Facts"].) As with the other instances where the FEC attempts to rely on newspaper reports in support of its factual assertions, however, the court will not accept such evidence as establishing the facts reported therein.

Resting on hundreds of factual allegations and thousands of pages of documentation, the Colorado Party and the FEC filed cross motions for summary judgment. (Mot. for Summ. J. [filed Jan. 23, 1998]; Def./Counter-Pl.'s Mot. for Summ. J. [filed Jan. 23, 1998].) The FEC contends that the Colorado Party has failed to present a justiciable controversy and seeks summary judgment on the grounds of standing and

[23] The FEC also makes allegations regarding activities by "party leaders" in assisting in state elections. (FEC Facts ¶¶ 283-91.) Those allegations do not, however, involve any Members of Congress. The allegation regarding the use of non-federal money by Republican Party leaders to assist in state elections involves soft money and does not suggest corruption or the appearance thereof. (FEC Facts ¶ 282.) What it does suggest is that parties are not just concerned at electoral success at the federal level, and that furthering parties' agendas at the state level is also an important aspect of parties' goals. The connection between these alleged activities and the corruption which the FEC claims will follow from unlimited party coordinated expenditures is not apparent to the court.

ripeness. (Federal Election Commission's Mem. in Supp. of Its Mot. for Summ. J., Submitted Under Seal at 17-20 [filed Jan. 23, 1998] [hereinafter "FEC's Summ. J. Br."].) At the heart of its argument on the merits, the FEC maintains that the Party Expenditure Provision serves a compelling Government interest and is narrowly tailored to achieve that interest. (*Id.* at 21-36.) It also maintains that the Party Expenditure Provision is not unconstitutionally vague. (*Id.* at 36-38.) The Colorado Party maintains that the Party Expenditure Provision severely restricts core First Amendment rights and that the FEC cannot carry its burden of establishing that the limits contained in the provision serve compelling governmental interests. (Mem. in Supp. of the Colorado Party's Mot. for Summ. J. [filed Jan. 23, 1998] [hereinafter "Colorado Party's Summ. J. Br."].)

ANALYSIS

1. Justiciability

a. Standing

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992), the Supreme Court held that "the irreducible constitutional minimum of standing" contains the following three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the chal-

> lenged action of the defendant[s], and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61, 112 S. Ct. at 2136 (citations omitted); *accord Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996). Plaintiff bears the burden of proving standing. *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136; *Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995). Where a challenge to standing is before the court on a motion for summary judgment, "standing must be supported by specific evidentiary facts and not by mere allegations." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (citing *Lujan*, 504 U.S. at 562, 112 S. Ct. at 2137). Here, the FEC questions whether the Colorado Party meets the injury- in-fact element of standing under *Lujan*.

It is a constitutional certainty that elections will continue to occur. U.S. Const. Art. I, 2, cl. 1; U.S. Const. amend XVII. It is almost as certain that the Colorado Party will have candidates in those elections whom it will want to support by way of coordinated expenditures. Indeed, during the 1996 federal election year, the Colorado Party made a single, large coordinated expenditure on behalf of its successful senatorial candidate, Wayne Allard. This expenditure alone came to within $4,000 of the limit which section 441a(d) imposed on the Colorado Party's coordinated expenditures for the senate race. (FEC Facts ¶ 30; *admitted in part and denied in part at* Colorado Party's Resp. to FEC Facts ¶ 30.) Donald K. Bain, erstwhile

chairman of the Colorado Party, testified that the Colorado Party "was, is, and for the foreseeable future will be ready, willing, and able to spend more [on coordinated expenditures than FECA permits]." (Colorado Party Exs. Vol. III, Ex. P [Bain Aff. ¶ 3] [filed Jan. 23, 1998] [hereinafter "Colo. Exs. Vol. III"].) Bain further testified that, in the 1996 campaign, the Colorado Party considered a coordinated expenditure in excess of the FECA limits, but ultimately refrained from making the expenditure because of the concern that the FEC would challenge such an expenditure. (*Id.*, Ex. P [Bain Aff. ¶ 4].) The Colorado Party's supposition that the FEC would challenge any coordinated expenditure exceeding the FECA statutory limit is not fanciful, for this case began as an FEC enforcement proceeding under the very section which is at issue now.

In these circumstances, I conclude that the Colorado Party has made a sufficient showing of injury-in-fact. It possesses the intent and the ability to make coordinated expenditures which exceed statutory limitations, and it would confront FEC enforcement action if it did so. Contrary to the FEC's apparent argument, the fact that the Colorado Party receives some money from the RNC or other national party committees for coordinated expenditures does not logically require the conclusion that the Colorado Party is impermissibly attempting to assert standing on behalf of the RNC. *See* FEC's Summ. J. Br. at 19.) The source of funds which a political party expends for a candidate is simply irrelevant to the question of whether the coordinated expenditure limitation constrains and chills the speech of the party on behalf of its candidates. Similarly, the fact that the Colorado Party may, from time to time, lack hard money which would permit it to exceed the

expenditure limitations does not defeat its standing. It may still receive hard funds from national or state party committees, and receipt of such funds would permit it to make expenditures which would exceed the limitations. Accordingly, I conclude that the Colorado Party has standing to challenge the coordinated expenditure limits.

b. Ripeness

Ripeness has been described as "providing a time-bound perspective [ ] on the injury inquiry of standing." *DKT Mem'l Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 298 (D.C. Cir. 1989) (quoting 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531, at 350 [2d ed. 1990]). The inquiry involves two elements: (1) the fitness of the issues for judicial decision; and (2) the hardship from withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Ripeness includes both constitutional elements and prudential elements. Because, however, this case involves First Amendment rights, the prudential elements on standing are lessened. *Phelps*, 122 F.3d at 1326 (citing *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956, 104 S. Ct. 2839, 2847, 81 L.Ed.2d 786 [1984]; *ACORN v. City of Tulsa, Okla.*, 835 F.2d 735, 738 [10th Cir. 1987]).

The FEC contends that the Colorado Party has failed to demonstrate the existence of a live dispute regarding the actual or threatened application of section 441a(d). (FEC's Summ. J. Br. at 20.) The FEC's position, in light of the history of this case and the Colorado Party's allegations and evidence regarding its campaign practices, limitations, and intentions, is unpersuasive.

As noted, this case began as an enforcement action under section 441a(d) for the Colorado Party's exceeding the coordinated expenditure limits imposed thereunder. The Supreme Court ultimately determined that the expenditure at issue was independent and not coordinated, but the reality facing the Colorado Party is that (1) what was believed to be a coordinated expenditure in excess of the limits was challenged in the past, and (2) the Colorado Party can expect to face and FEC challenge in the next election cycle if it makes a coordinated expenditure in contravention of section 441a(d). The Colorado Party need not wait for that to occur before a court considers its challenge to the coordinated expenditure limit. *See Secretary of State of Md.*, 467 U.S. at 956-57, 104 S. Ct. at 2847.

Indeed, the Court in *Colorado I* noted only that the case may be moot if in fact the Colorado Party wanted to make only independent expenditures. *Colorado I*, 518 U.S. at 624, 116 S. Ct. at 2320. The Colorado Party has clearly indicated that it is not content with unlimited independent expenditures, has curtailed coordinated expenditures in the past to avoid the specter of an FEC enforcement action, and wants to make coordinated expenditures which exceed what it contends is an impermissible limit on such expenditures. Accordingly, I conclude that the issue is fit for judicial consideration. Further, the Colorado Party would incur substantial hardship if this court were to refuse to hear its challenge until it actually violated the statute and found itself on the other side of an FEC action like the one that began this present judicial odyssey. *Cf. Buckley*, 424 U.S. at 117-18, 96 S. Ct. at 681-82 (permitting challenge to method of appointing FEC members in anticipation of future rulings and deter-

minations by the FEC). Accordingly, I conclude that the case is ripe for determination.

2. Severability

The Supreme Court directed that, on remand, the lower courts consider whether Congress would have wanted the Party Expenditure Provision to stand were the limits contained therein to apply only to coordinated, and not to independent, expenditures. *Colorado I*, 518 U.S. at 625-26, 116 S. Ct. at 2320-21. A conclusion that the limits on coordinated party expenditures cannot be severed from the unconstitutional limits on independent party expenditures would permit the court to resolve the Colorado Party's challenge to section 441a(d) as a matter of statutory construction, without reaching the constitutional issue of whether the First Amendment permits legislative limits on coordinated expenditures. *See United States v. Locke*, 471 U.S. 84, 92 & n. 9, 105 S. Ct. 1785, 1791 & n. 9, 85 L.Ed.2d 64 (1985). The Colorado Party contends that, the congressional attempt to limit a political party's independent expenditures having been found unconstitutional, Congress would never have intended to regulate only a political party's coordinated expenditures. The Colorado Party would thus have the court conclude that the limitation on coordinated expenditures must fall under the weight of the Court's decision in *Colorado I* concerning independent expenditures.

FECA contains a strong severability provision: "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such

provision to other persons and circumstances shall not be affected thereby." 2 U.S.C.A. § 454. Such a clause "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality." *Califano v. Westcott*, 443 U.S. 76, 90, 99 S. Ct. 2655, 2664, 61 L.Ed.2d 382 (1979) (construing an identically worded severability clause in the Social Security Act). The inclusion of such a clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S. Ct. 1476, 1481, 94 L.Ed.2d 661 (1987) (citations omitted). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108-09, 96 S. Ct. 612, 677, 46 L.Ed.2d 659 (1976) (internal citation and quotation marks omitted). "'[A] court should refrain from invalidating more of the statute than is necessary.'" *Alaska Airlines, Inc.*, 480 U.S. at 684, 107 S. Ct. at 1479 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S. Ct. 3262, 3268, 82 L.Ed.2d 487 [1984] [plurality opinion] [internal citation and quotations marks omitted]).

There is no evidence that Congress would have rejected the Party Expenditure Provision as it applies to coordinated expenditures in the absence of a limit on independent expenditures. Nothing necessarily and inherently links limits on independent expenditures with limits on coordinated expenditures. Section 441a(d) can operate to limit the latter without any regulation of the former. Because there is no evidence to the contrary, the presumption created by FECA's

strong severability clause compels the conclusion that the Party Expenditure Provision, as it applies to coordinated expenditures, remains in effect. The Colorado Party's motion is denied insofar as the Colorado Party seeks summary judgment on the ground that the unconstitutional independent expenditure limitation cannot be severed from the remainder of the Party Expenditure Provision.

3. The Merits of the Case: Constitutional Challenge to Section 441a(d)

a. Legislative History

The Colorado Party contends that, because the Party Expenditure Provision was enacted for the constitutionally infirm purpose of curtailing what Congress saw as excessive and wasteful campaign spending, it should be held unconstitutional. (Colorado Party's Summ. J. Br. at 19-21.) The Party Expenditure Provision, currently codified as 2 U.S.C.A. § 441a(d), had its origins in the Congress' 1974 federal election legislation. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 92-225, 86 Stat. 3 (then codified as 18 U.S.C.A. § 608[f]). *Buckley* recognized that the primary effect of the expenditure limitations, such as those embodied in what was then 18 U.S.C.A. § 608(f), was to limit the quantity of political speech. *Buckley*, 424 U.S. at 39, 96 S.Ct. at 644. In the aftermath of *Buckley*, Congress repealed 18 U.S.C.A. § 608. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 496. At the same time, Congress enacted a new section, codified as 2 U.S.C.A. § 441a, which incorporated and augmented the Party Expenditure Provision, as it been enacted in 1974. *See* Federal Election Campaign Act Amendments

of 1976, Pub. L. No. 94-283, 90 Stat. 489. The Court has since recognized that "Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." *Colorado I*, 518 U.S. at 618, 116 S.Ct. at 2317 (citing *Buckley*, 424 U.S. at 57, 96 S. Ct. at 653). Congress, however, reenacted the Party Expenditure Provision in light of the principles established in *Buckley*. Further, *Buckley* (and the Supreme Court precedents established therefrom) indicates that the primary purpose of FECA is to prevent corruption and the appearance thereof. *See Buckley*, 424 U.S. at 25-27, 96 S. Ct. at 637-39. Thus, although the origins of the Party Expenditure Provision included a constitutionally impermissible purpose, FECA also sought to control quid pro quo corruption or the appearance thereof. That FECA combined impermissible motives with permissible ones does not compel the conclusion that the Party Expenditure Provision is unconstitutional. Rather, the court must consider coordinated expenditures in light of the constitutional standards for regulating political speech.

b. Coordinated Expenditures by Political Parties

The FEC suggests at the outset that it need only meet an intermediate standard of scrutiny with respect to limits on coordinated party expenditures. In *Colorado I*, the Supreme Court reviewed previous cases which challenged provisions of FECA on First Amendment grounds. The Court determined that the analysis it had engaged in was "essentially weigh[ing] the First Amendment interest in permitting candidates

(and their supporters) to spend money to advance their political views, against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." *Colorado I*, 518 U.S. at 609, 116 S. Ct. at 2313 (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256-63, 107 S. Ct. 616, 626-30, 93 L Ed.2d 539 [1986]; *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 493-501, 105 S. Ct. 1459, 1466-71, 84 L.Ed.2d 455 [1985] [hereinafter "NCPAC "]; *California Med. Ass'n v. FEC*, 453 U.S. 182, 193-99, 101 S. Ct. 2712, 2720-23, 69 L.Ed.2d 567 [1981]; *Buckley*, 424 U.S. at 14-23, 96 S.Ct. at 632-37, 46 L.Ed.2d 659). In accordance with the standard established by the Supreme Court, and contrary to the FEC's suggestion, the FEC must demonstrate that the Party Expenditure Provision serves a compelling Government interest and is narrowly tailored. FEC carries a heavy burden of proof.

Section 441a(a) places dollar limits on contributions by persons and by multicandidate political committees. As noted earlier, coordinated expenditures are considered contributions. *See* 2 U.S.C.A. § 441a(a)(7)(B)(I). The FEC suggests that because coordinated expenditures are considered contributions, and contributions have been permissibly limited by the Supreme Court, this court's inquiry is at an end. (Br. by Counter-Def. Federal Election Commission in Opp'n to Mot. for Summ. J. at 5-9 [filed Feb. 17, 1998].) While it is true that the Court has permitted regulation of contributions, and that coordinated expenditures have been considered, in other circumstances, to be contributions, that does not end this court's inquiry. First, the court is not bound by the Government-selected labels or

characterizations, particularly in the context of a First Amendment challenge. *Colorado I*, 518 U.S. at 627, 116 S. Ct. at 2321 (citing *Landmark Co.. nunications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 1544, 56 L.Ed.2d 1 [1978] ["Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."]). Second, the Court has permitted regulation of contributions in the past because the regulations imposed only a "marginal restriction" on the contributor's First Amendment rights. *See Colorado I*, 518 U.S. at 627, 116 S. Ct. at 2321 (citing *Buckley*, 424 U.S. at 20, 96 S. Ct. at 635.) Thus, the question before the court is whether limits on coordinated party expenditures minimally restrict parties in engaging in protected First Amendment freedoms and serve a compelling Government interest. The case cannot be resolved solely by convenient reference to established categories.

The only permissible purpose for limitations on campaign expenditures is to prevent corruption or the appearance thereof. "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 470 U.S. at 497, 105 S. Ct. at 1468. The FEC's attempt to broaden the definition of corruption to include mere access is unsupported by precedent. In *Buckley*, the Court recognized that campaign finance reporting requirements serve the purpose of (1) identifying "[t]he sources of a candidate's financial support," and (2) deterring actual corruption and avoiding the appearance of corruption because "[a] public armed

with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Buckley*, 424 U.S. at 67, 96 S. Ct. at 658; *cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20, 115 S. Ct. 1511, 1523 n. 20, 131 L.Ed.2d 426 (1995) (recognizing that in *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L.Ed. 989 [1954], the Court upheld limited disclosure requirements for lobbyists and stating that "[t]he activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption."). *Buckley* thus recognized that money, in many cases, may grant access to a candidate. It did not, however, conclude that such access is akin to corruption or the appearance of corruption.

The FEC seeks to broaden the definition of corruption to the point that it intersects with the very framework of representative government. Corruption cannot be defined so broadly. Nor can corruption be defined to include whatever it is that political parties and candidates do which the FEC does not like. In order to carry its heavy burden, the FEC must establish that limiting party coordinated expenditures is necessary to avoid corruption or the appearance thereof.

"The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 1020, 103 L.Ed.2d 271 (1989). Political parties, and the central activities in which they engage, are a paradigm of the right to freedom of association as guaranteed by the First Amendment. *Id.*, 489 U.S. at

224, 109 S. Ct. at 1020-21. FECA specifically defines a political party as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C.A. § 431(16). FECA makes special provisions for political parties, 2 U.S.C.A. § 441a(d), and establishes a special position for them in the statutory framework out of the recognition that "a vigorous party system [is] vital to American politics." S. Rep. 93-689 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5593. A political party is an entity which (1) allows the individual voter to associate with others who share similar political beliefs, (2) identifies people who constitute the party, and (3) "select[s] a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224, 109 S. Ct. at 1020-21 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 107 S. Ct. 544, 548, 93 L.Ed.2d 514 [1986] [internal citations and quotations omitted] and quoting *Ripon Soc., Inc. v. National Republican Party*, 525 F.2d 567, 601 [1975]). Political parties "can give effect to their views only by selecting and supporting candidates." *Colorado I*, 518 U.S. at 629, 116 S. Ct. at 2322 (Kennedy, J. concurring in judgment and dissenting in part). Thus, political parties must have a continuing sense of their purpose and existence to succeed. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 821, 103 S. Ct. 1564, 1586-87, 75 L.Ed.2d 547 (1983) (Rehnquist, J., dissenting) ("Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election.").

Political parties, like PACs, "act in the political arena, . . . seek to elect candidates of their choice, . . . spend money, [and] want some policy outcome." (Colorado Party Facts ¶ 44, Ex. A [Alexander Report] at 17.) According to the Colorado Party, however, parties differ in at least one salient way from PACs. "While the various interest groups (and their PACs) usually have one specific goal or concern, political parties represent an amalgam or coalition of interests and goals; moreover, the purpose of parties is to gain control of government, rather than to pursue single goals, as PACs do." (Colorado Party Facts ¶ 44, Ex. A [Alexander Report at 17]; *see also id.* ¶ 33, Ex. A [Alexander Report at 24] [discussing the parties' need to be focused on longterm], Ex. E [Alexander Dep. at 111-12, 115] ["The party can't afford to get in a situation that is corrupt or corrupting because the party has to be held accountable, and the party is held accountable through the ballot."].) Parties help to build broad-based coalitions, both in terms of issues and in terms of geography, and parties are held accountable at the ballot box by the voters. (*See* Colorado Party Facts ¶¶ 45-48.) There is an identity cultivated by the law and borne out in fact between a political party and a candidate who represents that he or she is of that party. Political parties function, in large part, to elect persons who represent the shared political beliefs of their members. Thus, First Amendment rights—the freedom of speech and the freedom of association—are critical to attaining that goal. *See Colorado I*, 518 U.S. at 629, 116 S. Ct. at 2321 (Kennedy, J., concurring in judgment and dissenting in part).

The Colorado Party describes independent expenditures as "unnatural" because such expenditures

"create an artificial separation of the party and its candidate." The need to be independent of a candidate and his or her campaign so as not to run afoul of the requirements for independent expenditures and fall within the regulations on coordinated expenditures dampens the ability to engage in the party's normal functions and imposes additional costs and burdens to promote the party message. (Colorado Party Facts ¶¶ 31-32, Ex. A [Alexander Report at 25], Ex. B [Corrado Report at 35-37], Ex. C [Sorauf/Krasno Report at 44, 46], Ex. F [Bain Dep. at 46-47], Ex. K [Corrado Dep. at 54-56].) For example, independent expenditures do not qualify for the lowest rates on the purchase of broadcasting time, as coordinated expenditures would. (Colorado Party Facts ¶ 32, *admitted in pertinent part at* FEC's Resp. to Colorado Party Facts ¶ 32.) Because independent expenditures are perceived as often inefficient and counterproductive, it is suggested that the Colorado Party and other entities will not engage in them or will do so with extreme caution. (Colorado Party Facts ¶¶ 36-37, Ex. F [Bain Dep. at 47], Ex. M [Heubusch Dep. at 102, 106]; *see also id.* ¶ 38, Ex. A [Alexander Report at 24-25].) Coordinated expenditures, on the other hand, provide the candidate and the party the optimum opportunity to communicate their message. (Colorado Party Facts ¶¶ 40-41, 43.) Thus, unlike contributions, communications via coordinated party expenditures implicate core First Amendment rights. The message of the party and the message of the candidate are unified, and the party's dollars cannot be characterized as simply speech by proxy.

The FEC's argument is relatively simple: a powerful party hierarchy, made so because of its ability to grant or withhold funding for unlimited coordinated expen-

ditures, has the ability to exact a quid pro quo from a candidate who needs assistance from the party during his or her campaign. The FEC contends that "the record contains ample evidence . . . that large coordinated expenditures create the opportunity for [quid pro quo] arrangements." (FEC Summ. J. Br. at 24.) The FEC's claim fails. To support its argument, the FEC offers hundreds of factual allegations detailing party fund-raising practices, donor expectations of access, and party control over candidates. The facts which FEC contends support its position, however, do not establish that the limit on party coordinated expenditures is necessary to prevent corruption or the appearance thereof. The FEC must do more than show "the opportunity" for corruption. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 2470, 129 L.Ed.2d 497 (1994) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.") (citation and internal quotation marks omitted); *NCPAC*, 470 U.S. at 498, 105 S. Ct. at 1469.

The FEC appears to identify two types of "corruption" which are addressed by the Party Expenditure Provision. First, the FEC suggests that contributors to the party committees—individuals and PACs—are so powerful that they could force the party committee to compel a candidate to take a particular position. Second, parties themselves have agendas which they wish to pursue and will support only those candidates who agree to follow that agenda.

With respect to the former type of "corruption," the Colorado Party contends that the FEC can offer no

evidence of any quid pro quo corruption where a Member of Congress took an official action in exchange for any contribution to a political party. (Colorado Party Facts ¶ 58.) The FEC denies this assertion, offering what it claims are seven examples of such conduct. (FEC Facts ¶¶ 94, 179, 205, 250, 251, 262, 263.) The Colorado Party objects to all of these examples on various grounds. The FEC's factual assertions suffer numerous flaws. The evidentiary objections are all good ones. In addition, even if the proffered evidence were admissible, it does not support the FEC's position that limiting coordinated party expenditures serves the compelling Government interest of preventing corruption or the appearance thereof. The alleged facts either (1) involve claims of access, which, as the court has stated above, does not constitute corruption, or (2) involve soft money, which may not be used for coordinated expenditures anyway. None of the FEC's examples involve coordinated expenditures. The FEC cannot maintain the constitutionality of the coordinated expenditure provision by pointing to examples of money in the political process which are unrelated to party coordinated expenditures.[24]

Moreover, because of the limits on hard-money contributions, which are the only funds permissibly used for coordinated party expenditures, I regard contributor-to-party-to-candidate pressure as an unlikely

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[24] Moreover, if the skirting of contribution limits is the issue with which the FEC is concerned (*see* FEC Summ. J. Br. at 28-32), there are more tailored means of addressing such a concern than limiting the coordinated expenditure limits. *See Colorado I*, 518 U.S. at 616-17, 116 S. Ct. at 2316.

avenue of corruption, based on the facts in the record.[25] The FEC attempts to cloud the evidentiary picture before the court by including evidence of soft-money contributions. While soft money may be received in unlimited amounts and from a multitude of sources, there is no suggestion in the evidence that such money is also used for coordinated expenditures. To the extent that the FEC suggests that the court should consider the cumulative impact of hard and soft money contributions from one entity, I reject the suggestion. This case is not about the entirety of the campaign finance system.

Further, that candidates are made aware of who contributes to their campaigns and to the parties, despite the FEC's attempt to cast a sinister pall over such activity, is not, by itself, evidence of corruption or the appearance of corruption. The FECA reporting requirements which indicate the sources and amounts of contributions are designed to insure that campaign finance can be scrutinized. *Buckley*, 424 U.S. at 60-83, 96 S. Ct. at 654-66. Nothing in the record suggests that this type of fund raising and reporting begets corruption or the appearance of corruption.

With respect to the other type of "corruption" identified by the FEC—party pressure over candidates—despite the FEC's attempts to cast it otherwise, it is

[25] If Congress is concerned about how much hard money parties may receive, it may curtail such limits and do so directly and constitutionally. *Cf. Colorado I*, 518 U.S. at 617, 116 S. Ct. at 2316 (recognizing, in considering limits on independent party expenditures, that Congress could directly regulate contribution limits rather than indirectly prevent their circumvention by limiting independent expenditures).

not corruption. As *Buckley* reiterated again and again, the concern with corruption is related to "large individual financial contributions." *Buckley*, 424 U.S. at 26, 27, 96 S. Ct. at 638-39. Party-coordinated expenditures are not large individual contributions. As required by law and demonstrated by the evidence, the hard-money contributions are not from one or a few individuals. They come from many small contributors. Even the largest contributors are statutorily limited in the amounts they may give. I cannot conclude that party contributions are akin to large individual contributions. The relationship between a party and a Member of Congress who represents that party is wholly different from the relationship between a private individual or corporation and a Member of Congress. Parties exist because of their success in electing representatives of their philosophy to legislative bodies.

The FEC contends that parties exert influence over candidates.[26] (FEC Facts ¶¶ 211-41.) The FEC's facts do suggest that the parties and their committees are involved with the candidates and their policy positions. That, however, is the nature of the party-candidate relationship and, again, highlights the paramount First Amendment concerns with respect to limiting coordinated speech.

As discussed above, a political party functions to promote political ideas and policy objectives over time and through elected officials. Given the purpose of political parties in our electoral system, a political

[26] The FEC, in the factual allegations regarding this subject, combines factual assertions with argument and engages in speculation as to what could occur. Although this appears throughout the FEC's asserted facts, it is particularly acute in this section.

party's decision to support a candidate who adheres to the parties' beliefs is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt to exert improper influence. A candidate who does not wish to toe the party line is not excluded from participation in the political process or even in the party process. The FEC offers factual allegations which suggest that one party or the other withheld, or attempted to withhold, campaign funds from a candidate who expressed viewpoints or campaign tactics contrary to those thought preferable by the party. (*See, e.g.*, FEC Facts ¶ 224.) The court regards those as instances of the party and the candidate exercising their First Amendment rights. A party that refuses to fund a candidate who engages in what the party deems as undesirable campaign tactics is not reflecting corruption or the appearance of corruption. Indeed, the evidence offered by the parties suggests that the parties direct their coordinated expenditure dollars to candidates who are most in need, that is, candidates for whom the money could be the difference between winning or losing.

Unable to produce admissible evidence which convinces the court that party expenditures must be limited to prevent corruption, the FEC relies on the "appearance of corruption" to discharge its burden. Specifically, the FEC attempts to rely on the apparent public perception (or, perhaps, misperception) regarding the role of money in politics to establish that unlimited coordinated party expenditures cause the "appearance of corruption." (FEC Facts ¶¶ 292-302.) But, as the evidence reveals, (*see* Colorado Party Facts ¶¶ 49-53), the public is unaware of the nuances of

campaign financing, particularly the role of hard money in coordinated campaign expenditures. If the FEC's position is correct and the public cannot distinguish hard money from soft money and the role that each plays in the system, the proper course of action is not to limit speech by permitting unnecessary and unconstitutional limitations on parties' and candidate's freedoms of speech and association but, rather, to engage in more speech to educate the public. *See Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97, 97 S. Ct. 1614, 1620, 52 L.Ed.2d 155 (1977) (citing *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649, 71 L.Ed. 1095 [1927] [Brandeis, J. concurring]). The FEC cannot rely on general public dissatisfaction with parties and politicians and the amount of money in the political process, particularly money which cannot even be used for the expenditures at issue in this case, to support its claim that the party coordinated expenditure limit serves a compelling purpose and is narrowly tailored to accomplish that purpose.

In short, the FEC has failed to offer evidence which demonstrates the compelling need for limits on political party coordinated expenditures. Only by attempting to divert the focus of the case from hard money to soft money and by seeking to broaden the definition of corruption beyond recognizable bounds does the FEC even approach the requisite showing. As Justice Kennedy said in *Colorado I*:

> The problem is not just the absence of a basis in our First Amendment cases for treating the party's spending as contributions. The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do. It is

fanciful to suppose that limiting party spending of the type at issue here "does not in any way infringe the contributor's freedom to discuss candidates and issues," [*Buckley*, 424 U.S. at 21, 96 S. Ct. at 635], since it would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consultation." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here. *See* [*NCPAC*, 470 U.S. at 494- 495, 105 S. Ct. at 1467-68.]

We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election. Party spending "in cooperation, consultation, or concert with" a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in *Buckley* that the First Amendment does not permit regulation of the latter, *see* 424 U.S. at 54-59, 96 S. Ct. at 651-54, and it should not permit this regulation of the former. Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in *Buckley*, but that type of regulation is not at issue here.

Colorado I, 518 U.S. at 630, 116 S. Ct. 2309, at 2322-23, 135 L.Ed.2d 795 (Kennedy, J. concurring in judgment and dissenting in part). Because the FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof, I conclude that summary judgment is warranted. Accordingly, the FEC's motion for summary judgment is denied, and the Colorado Party's motion for summary judgment is granted with respect to its constitutional challenge to the Party Expenditure Provision. I therefore do not address the parties' arguments regarding vagueness.

4. Conclusion

Upon the foregoing findings and conclusions, it is therefore

ORDERED as follows:

1. The FEC's motion for summary judgment and to dismiss the amended counterclaim with prejudice is DENIED.

2. The Colorado Party's motion for summary judgment is GRANTED.

3. The parties' joint motion to correct the transcript is GRANTED.

4. The clerk shall forthwith enter judgment declaring that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against defendant.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 95-489

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE ET AL., PETITIONERS,

v.

FEDERAL ELECTION COMMISSION

[Argued: April 15, 1996
Decided: June 26, 1996]

Justice BREYER announced the judgment of the Court and delivered an opinion, in which Justice O'CONNOR and Justice SOUTER join.

In April 1986, before the Colorado Republican Party had selected its senatorial candidate for the fall's election, that Party's Federal Campaign Committee bought radio advertisements attacking Timothy Wirth, the Democratic Party's likely candidate. The Federal Election Commission (FEC) charged that this "expenditure" exceeded the dollar limits that a provision of the Federal Election Campaign Act of 1971 (FECA or Act) imposes upon political party "expenditure[s] in connection with" a "general election campaign" for congressional office. 90 Stat. 486, as amended, 2 U.S.C. § 441a(d)(3). This case focuses upon the constitutional-

ity of those limits as applied to this case. We conclude that the First Amendment prohibits the application of this provision to the kind of expenditure at issue here—an expenditure that the political party has made independently, without coordination with any candidate.

I

To understand the issues and our holding, one must begin with FECA as it emerged from Congress in 1974. That Act sought both to remedy the appearance of a "corrupt" political process (one in which large contributions seem to buy legislative votes) and to level the electoral playing field by reducing campaign costs. See *Buckley v. Valeo*, 424 U.S. 1, 25-27 (1976) (*per curiam*). It consequently imposed limits upon the amounts that individuals, corporations, "political committees" (such as political action committees, or PAC's), and political parties could *contribute* to candidates for federal office, and it also imposed limits upon the amounts that candidates, corporations, labor unions, political committees, and political parties could *spend*, even on their own, to help a candidate win election. See 18 U.S.C. §§ 608, 610 (1970 ed., Supp. IV).

This Court subsequently examined several of the Act's provisions in light of the First Amendment's free speech and association protections. See *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (*NCPAC*); *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182 (1981); *Buckley*, *supra*. In these cases, the Court essentially

weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a "compelling" governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption. See *Massachusetts Citizens for Life*, *supra*, at 256-263; *NCPAC*, *supra*, at 493-501; *California Medical Assn.*, *supra*, at 193-199; *Buckley*, 424 U.S., at 14-23. After doing so, the Court found that the First Amendment prohibited some of FECA's provisions, but permitted others.

Most of the provisions this Court found unconstitutional imposed *expenditure* limits. Those provisions limited candidates' rights to spend their own money, *id.*, at 51-54, limited a candidate's campaign expenditures, *id.*, at 54-58, limited the right of individuals to make "independent" expenditures (not coordinated with the candidate or candidate's campaign), *id.*, at 39-51, and similarly limited the right of political committees to make "independent" expenditures, *NCPAC*, *supra*, at 497. The provisions that the Court found constitutional mostly imposed *contribution* limits—limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate, § 441a(a)(7)(B)(i). See *Buckley*, *supra*, at 23-36. See also 424 U.S., at 46-48; *California Medical Assn.*, *supra*, at 193-199 (limits on contributions to political committees). Consequently, for present purposes, the Act now prohibits individuals and political committees from making direct, or indirect, contributions that exceed the following limits:

(a) For any "person": $1,000 to a candidate "with respect to any election"; $5,000 to any political committee in any year; $20,000 to the national committees of a political party in any year; but all within an overall limit (for any individual in any year) of $25,000. 2 U.S.C. §§ 441a(a)(1), (3).

(b) For any "multicandidate political committee": $5,000 to a candidate "with respect to any election"; $5,000 to any political committee in any year; and $15,000 to the national committees of a political party in any year. § 441a(a)(2).

FECA also has a special provision, directly at issue in this case, that governs contributions and expenditures by political parties. § 441a(d). This special provision creates, in part, an *exception* to the above contribution limits. That is, without special treatment, political parties ordinarily would be subject to the general limitation on contributions by a "multicandidate political committee" just described. See § 441a(a)(4). That provision, as we said in subsection (b) above, limits annual contributions by a "multicandidate political committee" to no more than $5,000 to any candidate. And as also mentioned above, this contribution limit governs not only direct contributions but also indirect contributions that take the form of coordinated expenditures, defined as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." § 441a(a)(7)(B)(i). Thus, ordinarily, a party's coordinated expenditures would be subject to the $5,000 limitation.

However, FECA's special provision, which we shall call the "Party Expenditure Provision," creates a

general exception from this contribution limitation, and from any other limitation on expenditures. It says:

> "Notwithstanding any other provision of law with respect to *limitations on expenditures or limitations on contributions*, . . . political party [committees] . . . may make *expenditures* in connection with the general election campaign of candidates for Federal office . . . ." § 441a(d)(1) (emphasis added).

After exempting political parties from the general contribution and expenditure limitations of the statute, the Party Expenditure Provision then imposes a *substitute limitation* upon party "expenditures" in a senatorial campaign equal to the greater of $20,000 or "2 cents multiplied by the voting age population of the State," § 441a(d)(3)(A)(i), adjusted for inflation since 1974, § 441a(c). The provision permitted a political party in Colorado in 1986 to spend about $103,000 in connection with the general election campaign of a candidate for the United States Senate. See FEC Record, vol. 12, no. 4, p. 1 (Apr.1986). (A different provision, not at issue in this case, § 441a(d)(2), limits party expenditures in connection with Presidential campaigns. Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns.)

In January 1986, Timothy Wirth, then a Democratic Congressman, announced that he would run for an open Senate seat in November. In April, before either the Democratic primary or the Republican convention, the Colorado Republican Federal Campaign Committee (Colorado Party or Party), a petitioner here, bought

radio advertisements attacking Congressman Wirth. The State Democratic Party complained to the FEC. It pointed out that the Colorado Party had previously assigned its $103,000 general election allotment to the National Republican Senatorial Committee, leaving it without any permissible spending balance. See *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (state party may appoint national senatorial campaign committee as agent to spend its Party Expenditure Provision allotment). It argued that the purchase of radio time was an "expenditure in connection with the general election campaign of a candidate for Federal office," § 441a(d)(3), which, consequently, exceeded the Party Expenditure Provision limits.

The FEC agreed with the Democratic Party. It brought a complaint against the Colorado Party, charging a violation. The Colorado Party defended in part by claiming that the Party Expenditure Provision's expenditure limitations violated the First Amendment—a charge that it repeated in a counterclaim that said the Colorado Party intended to make other "expenditures directly in connection with" senatorial elections, App. 68, ¶ 48, and attacked the constitutionality of the entire Party Expenditure Provision. The Federal District Court interpreted the provision's words " 'in connection with' the general election campaign of a candidate" narrowly, as meaning only expenditures for advertising using "'express words of advocacy of election or defeat.'" 839 F. Supp. 1448, 1455 (D. Colo. 1993) (quoting *Buckley*, 424 U.S., at 46, n. 52). See also *Massachusetts Citizens for Life*, 479 U.S., at 249. As so interpreted, the court held, the provision did not cover the expenditures here. The

court entered summary judgment for the Colorado Party and dismissed its counterclaim as moot.

Both sides appealed. The Government, for the FEC, argued for a somewhat broader interpretation of the statute—applying the limits to advertisements containing an "electioneering message" about a "clearly identified candidate," FEC Advisory Op.1985-14, 2 CCH Fed. Election Camp. Fin. Guide ¶ 5819, p. 11,185 (May 30, 1985) which, it said, both covered the expenditure and satisfied the Constitution. The Court of Appeals agreed. It found the Party Expenditure Provision applicable, held it constitutional, and ordered judgment in the FEC's favor. 59 F.3d 1015, 1023-1024 (CA 10 1995).

We granted certiorari primarily to consider the Colorado Party's argument that the Party Expenditure Provision violates the First Amendment "either facially or as applied." Pet. for Cert. i. For reasons we shall discuss in Part IV, *infra*, we consider only the latter question—whether the Party Expenditure Provision as applied here violates the First Amendment. We conclude that it does.

II

The summary judgment record indicates that the expenditure in question is what this Court in *Buckley* called an "independent" expenditure, not a "coordinated" expenditure that other provisions of FECA treat as a kind of campaign "contribution." See *Buckley, supra*, at 36-37, 46-47, 78; *NCPAC*, 470 U.S., at 498. The record describes how the expenditure was

made. In a deposition, the Colorado Party's Chairman, Howard Callaway, pointed out that, at the time of the expenditure, the Party had not yet selected a senatorial nominee from among the three individuals vying for the nomination. App. 195-196. He added that he arranged for the development of the script at his own initiative, *id.*, at 200, that he, and no one else, approved it, *id.*, at 199, that the only other politically relevant individuals who might have read it were the Party's executive director and political director, *ibid.*, and that all relevant discussions took place at meetings attended only by Party staff, *id.*, at 204.

Notwithstanding the above testimony, the Government argued in District Court—and reiterates in passing in its brief to this Court, Brief for Respondent 27, n. 20—that the deposition showed that the Party had coordinated the advertisement with its candidates. It pointed to Callaway's statement that it was the practice of the Party to "coordinat[e] with the candidate" "campaign strategy," App. 195, and for Callaway to be "as involved as [he] could be" with the individuals seeking the Republican nomination, *ibid.*, by making available to them "all of the assets of the party," *id.*, at 195-196. These latter statements, however, are general descriptions of Party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate. We can find no "genuine" issue of fact in this respect. Fed. Rule Civ. Proc. 56(e); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986).

And we therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

So treated, the expenditure falls within the scope of the Court's precedents that extend First Amendment protection to independent expenditures. Beginning with *Buckley*, the Court's cases have found a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *NCPAC*, *supra*, at 497. This difference has been grounded in the observation that restrictions on contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication," *Buckley*, *supra*, at 20-21, because the symbolic communicative value of a contribution bears little relation to its size, 424 U.S., at 21, and because such limits leave "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources," *id.*, at 28. At the same time, reasonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors. *Id.*, at 26-27.

In contrast, the Court has said that restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and "represent substantial . . . restraints on the quantity and diversity of political speech." *Id.*, at 19. And at the same time, the Court

has concluded that limitations on independent expenditures are less directly related to preventing corruption, since "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*, at 47.

Given these established principles, we do not see how a provision that limits a political party's independent expenditures can escape their controlling effect. A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees. See, *e.g.*, *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989).

We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction. When this Court considered, and held unconstitutional, limits that FECA had set on certain independent expenditures by PAC's, it reiterated *Buckley*'s observation that "the absence of prearrangement and coordination" does not eliminate, but it does help to "alleviate," any "danger" that a candidate will understand the ex-

penditure as an effort to obtain a "*quid pro quo*." See *NCPAC*, 470 U.S., at 498. The same is true of independent party expenditures.

We recognize that FECA permits individuals to contribute more money ($20,000) to a party than to a candidate ($1,000) or to other political committees ($5,000). 2 U.S.C. § 441a(a). We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and "get out the vote" drives, see § 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated. Unregulated "soft money" contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute. See § 431(8)(B). Any contribution to a party that is earmarked for a particular campaign is considered a contribution to the candidate and is subject to the contribution limitations. § 441a(a)(8). A party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are also considered contributions and are subject to the contribution limits on a "multicandidate political committee." § 441a(a)(2). The greatest danger of corruption, therefore, appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties. Cf. *California*

Medical Assn., 453 U.S., at 197-199 (plurality opinion) (danger of evasion of limits on contribution to candidates justified prophylactic limitation on *contributions* to PAC's). But we do not believe that the risk of corruption present here could justify the "markedly greater burden on basic freedoms caused by" the statute's limitations on *expenditures*. *Buckley*, 424 U.S., at 44. See also *id.*, at 46-47, 51; *NCPAC*, *supra*, at 498. Contributors seeking to avoid the effect of the $1,000 contribution limit indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See *Buckley*, *supra*, at 44-48 (risk of corruption by individuals' independent expenditures is insufficient to justify limits on such spending). If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See *Buckley*, *supra*, at 45-46; *NCPAC*, *supra*, at 498. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S.

622, 664 (1994) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured" (citation and internal quotation marks omitted)); *NCPAC*, *supra*, at 498. To the contrary, this Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending. See *Buckley*, *supra*, at 57. In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections. See *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S., at 41 (Party Expenditure Provision was intended to "assur[e] that political parties will continue to have an important role in federal elections"); S. Rep. No. 93-689, p. 7 (1974) ("[A] vigorous party system is vital to American politics. . . . [P]ooling resources from many small contributors is a legitimate function and an integral part of party politics"); *id.*, at 7-8, 15.

We therefore believe that this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties. Having concluded this, we need not consider the Party's further claim that the statute's "in connection with" language, and the FEC's

interpretation of that language, are unconstitutionally vague. *Cf. Buckley*, *supra*, at 40- 44.

III

The Government does not deny the force of the precedent we have discussed. Rather, it argued below, and the lower courts accepted, that the expenditure in this case should be treated under those precedents, not as an "independent expenditure," but rather as a "coordinated expenditure," which those cases have treated as "contributions," and which those cases have held Congress may constitutionally regulate. See, *e.g.*, *Buckley*, *supra*, at 23-38.

While the District Court found that the expenditure in this case was "coordinated," 839 F. Supp., at 1453, it did not do so based on any factual finding that the Party had consulted with any candidate in the making or planning of the advertising campaign in question. Instead, the District Court accepted the Government's argument that all party expenditures should be treated as if they had been coordinated *as a matter of law*, "[b]ased on Supreme Court precedent and the Commission's interpretation of the statute," *ibid.* The Court of Appeals agreed with this legal conclusion. 59 F.3d, at 1024. Thus, the lower courts' "finding" of coordination does not conflict with our conclusion, *supra*, at 613-614, that the summary judgment record shows no actual coordination as a matter of fact. The question, instead, is whether the Court of Appeals erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are "coordinated." We believe it did.

In support of its argument, the Government points to a set of legal materials, based on FEC interpretations, that seem to say or imply that *all* party expenditures are "coordinated." These include: (1) an FEC regulation that forbids political parties to make any "independent expenditures . . . in connection with" a "general election campaign," 11 CFR § 110.7(b)(4) (1995); (2) FEC Advisory Opinions that use the word "coordinated" to describe the Party Expenditure Provisions' limitations, see, *e.g.*, FEC Advisory Op.1984-15, 1 CCH Fed. Election Camp. Fin. Guide ¶ 5766, p. 11,069 (May 31, 1984) (AO 1984-15); FEC Advisory Op.1988-22, 2 CCH Fed. Election Camp. Fin. Guide ¶ 5932, p. 11,471, n.4 (July 5, 1988) (AO 1988-22); (3) one FEC Advisory Opinion that says explicitly in a footnote that "coordination with candidates is presumed and 'independence' precluded," *ibid.*; and (4) a statement by this Court that "[p]arty committees are considered incapable of making 'independent' expenditures," *Democratic Senatorial Campaign Comm.*, *supra*, at 28-29, n.1.

The Government argues, on the basis of these materials, that the FEC has made an "empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election." Brief for Respondent 27. The FEC materials, however, do not make this empirical judgment. For the most part those materials use the word "coordinated" as a description that does not necessarily deny the possibility that a party could *also* make independent expenditures. See, *e.g.*, AO 1984-15, ¶ 5766, at 11,069. We concede that one Advisory Opinion says, in a footnote, that "coordination with candidates is presumed." AO 1988-22, ¶ 5932, at 11,471, n.4. But this statement, like the others, appears without any internal or external evidence that the FEC means it to embody an *empirical* judgment (say, that parties, in fact, hardly ever spend money independently) or to represent the outcome of an empirical investigation. Indeed, the statute does not require any such investigation, for it applies *both* to coordinated and to independent expenditures alike. See § 441a(d)(3) (a "political party . . . may not make *any* expenditure" in excess of the limits (emphasis added)). In any event, language in other FEC Advisory Opinions suggests the opposite, namely, that sometimes, in fact, parties do make independent expenditures. See, *e.g.*, AO 1984-15, ¶ 5766, at 11,069 ("Although consultation or coordination with the candidate is permissible, it is not required"). In these circumstances, we cannot take the cited materials as an empirical, or experience-based, determination that, as a factual matter, all party expenditures are coordinated with a candidate. That being so, we need not hold, on the basis of these materials, that the expenditures here were "coordinated."

The Government does not advance any other legal reason that would require us to accept the FEC's characterization. The FEC has not claimed, for example, that, administratively speaking, it is more difficult to separate a political party's "independent," from its "coordinated," expenditures than, say, those of a PAC. Cf. 11 CFR § 109.1 (1995) (distinguishing between independent and coordinated expenditures by other political groups). Nor can the FEC draw significant legal support from the footnote in *Democratic Senatorial Campaign Comm.*, 454 U.S., at 28-29, n. 1, given that this statement was dicta that purported to describe the

regulatory regime as the FEC had described it in a brief.

Nor does the fact that the Party Expenditure Provision fails to distinguish between coordinated and independent expenditures indicate a congressional judgment that such a distinction is impossible or untenable in the context of political party spending. Instead, the use of the unmodified term "expenditure" is explained by Congress' desire to limit *all* party expenditures when it passed the 1974 amendments, just as it had limited all expenditures by individuals, corporations, and other political groups. See 18 U.S.C. §§ 608(e), 610 (1970 ed., Supp. IV); *Buckley*, 424 U.S., at 39.

Finally, we recognize that the FEC may have characterized the expenditures as "coordinated" in light of this Court's constitutional decisions prohibiting regulation of most independent expenditures. But, if so, the characterization cannot help the Government prove its case. An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one. See, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 429 (1963) (the government "cannot foreclose the exercise of constitutional rights by mere labels"); *Edwards v. South Carolina*, 372 U.S. 229, 235-238 (1963) (State may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations).

The Government also argues that the Colorado Party has conceded that the expenditures are "coordinated." But there is no such concession in respect to the underlying facts. To the contrary, the Party's "Questions Presented" in its petition for certiorari describes the expenditure as one "the party has not coordinated with its candidate." See Pet. for Cert. i. In the lower courts the Party did accept the FEC's terminology, but it did so in the context of legal arguments that did not focus upon the constitutional distinction that we now consider. See Reply Brief for Petitioners 9-10, n.8 (denying that the FEC's labels can control constitutional analysis). The Government has not referred us to any place where the Party conceded away or abandoned its legal claim that Congress may not limit the uncoordinated expenditure at issue here. And, in any event, we are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts. Cf. *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 447 (1993); *Massachusetts v. United States*, 333 U.S. 611, 623-628 (1948); *Young v. United States*, 315 U.S. 257, 259 (1942) (recognizing that "our judgments are precedents" and that the proper understanding of matters of law "cannot be left merely to the stipulation of parties").

Finally, the Government and supporting *amici* argue that the expenditure is "coordinated" because a party and its candidate are identical, *i.e.*, the party, in a sense, "is" its candidates. We cannot assume, however, that this is so. See, *e.g.*, W. Keefe, Parties, Politics, and Public Policy in America 59-74 (5th ed. 1988) (describing parties as "coalitions" of differing interests). Congress chose to treat candidates and their parties quite differently under the Act, for example, by regulating contributions from one to the other. See § 441a(a)(2)(B). See also 11 CFR §§ 110.2, 110.3(b)

(1995). And we are not certain whether a metaphysical identity would help the Government, for in that case one might argue that the absolute identity of views and interests eliminates any potential for corruption, as would seem to be the case in the relationship between candidates and their campaign committees. Cf. *Buckley, supra*, at 54-59 (Congress may not limit expenditures by candidate/campaign committee); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (where there is no risk of "corruption" of a candidate, the Government may not limit even contributions).

IV

The Colorado Party and supporting *amici* have argued a broader question than we have decided, for they have claimed that, in the special case of political parties, the First Amendment forbids congressional efforts to limit coordinated expenditures as well as independent expenditures. Because the expenditure before us is an independent expenditure we have not reached this broader question in deciding the Party's "as applied" challenge.

We recognize that the Party filed a counterclaim in which it sought to raise a facial challenge to the Party Expenditure Provision as a whole. But that counterclaim did not focus specifically upon coordinated expenditures. See App. 68-69. Nor did its summary judgment affidavits specifically allege that the Party intended to make coordinated expenditures exceeding the statute's limits. See *id.*, at 159, ¶ 4. While this lack of focus does not deprive this Court of jurisdiction to consider a facial challenge to the Party Expenditure Provision as overbroad or as unconstitutional in all

applications, it does provide a prudential reason for this Court not to decide the broader question, especially since it may not be necessary to resolve the entire current dispute. If, in fact, the Party wants to make only independent expenditures like those before us, its counterclaim is mooted by our resolution of its "as applied" challenge. Cf. *Renne v. Geary*, 501 U.S. 312, 323-324 (1991) (facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985).

More importantly, the opinions of the lower courts, and the parties' briefs in this case, did not squarely isolate, and address, party expenditures that *in fact* are coordinated, nor did they examine, in that context, relevant similarities or differences with similar expenditures made by individuals or other political groups. Indeed, to our knowledge, this is the first case in the 20-year history of the Party Expenditure Provision to suggest that in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment, even though this Court's prior cases have permitted regulation of similarly coordinated expenditures by individuals and other political groups. See *Buckley*, 424 U.S., at 46-47. This issue is complex. As Justice KENNEDY points out, *post*, at 629-630, party coordinated expenditures do share some of the constitutionally relevant features of independent expenditures. But many such expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills, see *Buckley, supra*, at 46). Moreover, political parties also share relevant features

with many PAC's, both having an interest in, and devoting resources to, the goal of electing candidates who will "work to further" a particular "political agenda," which activity would benefit from coordination with those candidates. *Post*, at 630. See, *e.g.*, *NCPAC*, 470 U.S., at 490 (describing the purpose and activities of the National Conservative PAC); *id.*, at 492 (coordinated expenditures by PAC's are subject to FECA contribution limitations). Thus, a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits.

But the focus of this litigation, and of the lower court opinions, has not been on such issues, but rather on whether the Government may conclusively deem independent party expenditures to be coordinated. This lack of focus may reflect, in part, the litigation strategy of the parties. The Government has denied that any distinction can be made between a party's independent and its coordinated expenditures. The Colorado Party, for its part, did not challenge a different provision of the statute—a provision that imposes a $5,000 limit on any contribution by a "multicandidate political committee" (including a coordinated expenditure) and which would apply to party coordinated expenditures if the entire Party Expenditure Provision were struck from the statute as unconstitutional. See §§ 441a(a)(2), (4), (7)(B)(i). Rather than challenging the constitutionality of this provision as well, thereby making clear that it was challenging Congress' authority to regulate in-fact coordinated party expenditures, the Party has made an obscure severability argument that would leave party coordinated expenditures exempt from that provision. See Reply Brief for Petitioners 11,

n. 9. While these strategies do not deprive the parties of a right to adjudicate the counterclaim, they do provide a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion.

Finally, we note that neither the parties nor the lower courts have considered whether or not Congress would have wanted the Party Expenditure Provision's limitations to stand were they to apply only to coordinated, and not to independent, expenditures. See *Buckley*, *supra*, at 108; *NCPAC*, *supra*, at 498. This nonconstitutional ground for exempting party coordinated expenditures from FECA limitations should be briefed and considered before addressing the constitutionality of such regulation. See *United States v. Locke*, 471 U.S. 84, 92, and n. 9 (1985).

JUSTICE THOMAS disagrees and would reach the broader constitutional question notwithstanding the above prudential considerations. In fact, he would reach a great number of issues neither addressed below, nor presented by the facts of this case, nor raised by the parties, for he believes it appropriate here to overrule *sua sponte* this Court's entire campaign finance jurisprudence, developed in numerous cases over the last 20 years. See *post*, at 635-644. Doing so seems inconsistent with this Court's view that it is ordinarily "inappropriate for us to reexamine" prior precedent "without the benefit of the parties' briefing," since the "principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties." *United States v. International Business Machines Corp.*, 517 U.S. 843, 855, 856 (1996). In our view, given the

important competing interests involved in campaign finance issues, we should proceed cautiously, consistent with this precedent, and remand for further proceedings.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring in the judgment and dissenting in part.

In agreement with JUSTICE THOMAS, *post*, at 631-634, I would hold that the Colorado Republican Party (Party), in its pleadings in the District Court and throughout this litigation, has preserved its claim that the constraints imposed by the Federal Election Campaign Act of 1971 (FECA), both on its face and as interpreted by the Federal Elections Commission (FEC), violate the First Amendment.

In the principal opinion's view, the FEC's conclusive presumption that all political party spending relating to identified candidates is "coordinated" cannot be squared with the First Amendment. *Ante*, at 619-623. The principal opinion finds the presumption invalid, and I agree with much of the reasoning behind that conclusion. The quarrel over the FEC's presumption is beside the point, however, for under the statute it is both burdensome and quite unrealistic for a political party to attempt the expenditure of funds on a candi-

date's behalf (or against other candidates) without running afoul of FECA's spending limitations.

Indeed, the principal opinion's reasoning with respect to the presumption illuminates the deficiencies in the statutory provision as a whole as it constrains the speech and political activities of political parties. The presumption is a logical, though invalid, implementation of the statute, which restricts as a "contribution" a political party's spending "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). While the statutory provision applies to any "person," its obvious purpose and effect when applied to political parties, as the FEC's presumption reflects, is to restrict any party's spending in a specific campaign for or against a candidate and so to burden a party in expending its own money for its own speech.

The central holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), is that spending money on one's own speech must be permitted, *id.*, at 44-58, and this is what political parties do when they make the expenditures FECA restricts. FECA calls spending of this nature a "contribution," § 441a(a)(7)(B)(i), and it is true that contributions can be restricted consistent with *Buckley*, *supra*, at 23-38. As the principal opinion acknowledges, however, and as our cases hold, we cannot allow the Government's suggested labels to control our First Amendment analysis. *Ante*, at 621-622. See also, *e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). In *Buckley*, we concluded

that contribution limitations imposed only "marginal restriction[s]" on the contributor's First Amendment rights, 424 U.S., at 20, because certain attributes of contributions make them less like "speech" for First Amendment purposes:

> "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*, at 21 (footnote omitted).

We had no occasion in *Buckley* to consider possible First Amendment objections to limitations on spending by parties. *Id.*, at 58, n.66. While our cases uphold contribution limitations on individuals and associations, see *id.*, at 23-38; *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 193-199 (1981) (plurality opinion), political party spending "in cooperation,

consultation, or concert with" a candidate does not fit within our description of "contributions" in *Buckley*. In my view, we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending.

The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs. See, *e.g.*, *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Cf. *Morse v. Republican Party of Va.*, 517 U.S. 186, 250-251 (1996) (KENNEDY, J., dissenting). A party performs this function, in part, by "identify[ing] the people who constitute the association, and . . . limit[ing] the association to those people only." *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates. A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa.

It makes no sense, therefore, to ask, as FECA does, whether a party's spending is made "in cooperation, consultation, or concert with" its candidate. The answer in most cases will be yes, but that provides

more, not less, justification for holding unconstitutional the statute's attempt to control this type of party spending, which bears little resemblance to the contributions discussed in *Buckley*. *Supra*, at 627-628 and this page. Party spending "in cooperation, consultation, or concert with" its candidates of necessity "communicate[s] the underlying basis for the support," 424 U.S., at 21, *i.e.*, the hope that he or she will be elected and will work to further the party's political agenda.

The problem is not just the absence of a basis in our First Amendment cases for treating the party's spending as contributions. The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do. It is fanciful to suppose that limiting party spending of the type at issue here "does not in any way infringe the contributor's freedom to discuss candidates and issues," *ibid.*, since it would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consultation." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 494-495 (1985).

We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of

interests between the two entities during an election. Party spending "in cooperation, consultation, or concert with" a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in *Buckley* that the First Amendment does not permit regulation of the latter, see 424 U.S., at 54-59, and it should not permit this regulation of the former. Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in *Buckley*, but that type of regulation is not at issue here.

I would resolve the Party's First Amendment claim in accord with these principles rather than remit the Party to further protracted proceedings. Because the principal opinion would do otherwise, I concur only in the judgment.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join as to Parts I and III, concurring in the judgment and dissenting in part.

I agree that petitioners' rights under the First Amendment have been violated, but I think we should reach the facial challenge in this case in order to make clear the circumstances under which political parties may engage in political speech without running afoul of 2 U.S.C. § 441a(d)(3). In resolving that challenge, I would reject the framework established by *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), for analyzing the constitutionality of campaign finance laws and hold that § 441a(d)(3)'s limits on independent and coordinated expenditures fail strict scrutiny. But even under *Buckley*, § 441a(d)(3) cannot stand, because the anti-

corruption rationale that we have relied upon in sustaining other campaign finance laws is inapplicable where political parties are the subject of such regulation.

I

As an initial matter, I write to make clear that we should decide the Colorado Republican Party's (Party's) facial challenge to § 441a(d)(3) and thus address the constitutionality of limits on coordinated expenditures by political parties. JUSTICE BREYER's reasons for not reaching the facial constitutionality of the statute are unpersuasive. In addition, concerns for the chilling of First Amendment expression counsel in favor of resolving that question.

After the Federal Election Commission (FEC) brought this action against the Party, the Party counterclaimed that "the limits on its expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U.S.C. § 441a(d) are unconstitutional, both facially and as applied." App. 68. Though JUSTICE BREYER faults the Party for not "focus[ing] specifically upon coordinated expenditures," *ante*, at 623, the term "expenditures" certainly includes both coordinated as well as independent expenditures.[1] See 2 U.S.C. § 431(9)(A) ("The term 'expenditure' includes . . . *any* purchase, payment, distribution, loan,

[1] JUSTICE BREYER acknowledges as much when he asserts earlier in his opinion that "the unmodified term 'expenditure'" reflects a congressional intent "to limit *all* party expenditures." *Ante*, at 621 (emphasis in original).

advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office" (emphasis added)). Moreover, at the time the Party filed its counterclaim, all party expenditures were treated by law as coordinated, see *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28-29, n.1 (1981), so a reference to expenditures by a party was tantamount to a reference to coordinated expenditures.

Given the liberal nature of the rules governing civil pleading, see Fed. Rule Civ. Proc. 8, the Party's straightforward allegation of the unconstitutionality of § 441a(d)(3)'s expenditure limits clearly suffices to raise the claim that neither independent nor coordinated expenditures may be regulated consistently with the First Amendment. Indeed, that is precisely how the Court of Appeals appears to have read the counterclaim. The court expressly said that it was "analyzing the constitutionality of limits on coordinated expenditures by political committees," 59 F.3d 1015, 1024 (CA 10 1995), under § 441a(d)(3).

For the same reasons, the fact that the Party's summary judgment affidavits did not "specifically allege," *ante*, at 623, that the Party intended to make coordinated expenditures is also immaterial. The affidavits made clear that, but for § 441a(d)(3), the Party would spend in excess of the limits imposed by that statute, see App. 159 ("[T]he State Party intends to pay for communications within the spending limits of [§ 441]. . . . However, the State Party would also like to pay for communications which costs [*sic*] exceed the spending limits of [§ 441a(d)], but will not do so due to the deterrent and chilling effect of the statute"), as did

the Party's brief in this Court, see Brief for Petitioners 23-24 ("The Colorado Party is ready, willing and able to make expenditures expressly advocating the election or defeat of candidates for federal office that would exceed the limits imposed by § 441a(d), but it has been deterred from doing so by the obvious and credible threat of FEC enforcement actions").

Finally, though JUSTICE BREYER notes that this is the first Federal Election Campaign Act of 1971 (FECA) case to raise the constitutional validity of limits on coordinated expenditures, see *ante*, at 624, that is, at best, an argument against granting certiorari. It is too late for arguments like that now. The case is here, and we needlessly protract this litigation by remanding this important issue to the Court of Appeals. Nor is the fact that the "issue is complex," *ibid.*, a good reason for avoiding it. We do not sit to decide only easy cases. And while it may be true that no court has ever asked whether expenditures that are "*in fact*" coordinated may be regulated under the First Amendment, see *ibid.*, I do not see how the existence of an "in fact" coordinated expenditure would change our analysis of the facial constitutionality of § 441a(d)(3), since courts in facial challenges under the First Amendment routinely consider applications of the relevant statute other than the application before the court. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Whether or not there are facts in the record to support the finding that this particular expenditure was actually coordinated with a candidate, we are not, contrary to the suggestion of JUSTICE BREYER, incapable of considering the Government's interest in

regulating such expenditures and testing the fit between that end and the means used to achieve it.[2]

The validity of § 441a(d)(3)'s controls on coordinated expenditures is an open question that, if left unanswered, will inhibit the exercise of legitimate First Amendment activity nationwide. All JUSTICE BREYER resolves is that when a political party spends money in support of a candidate (or against his opponent) and the Government cannot thereafter prove any coordination between the party and the candidate, the party cannot be punished by the Government for that spending. This settles little, if anything. Parties are left to wonder whether their speech is protected by the First Amendment when the Government can show—presumably with circumstantial evidence—a link between the party and the candidate with respect to the speech in question. And of course, one of the main purposes of a political party is to support its candidates in elections.

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[2] JUSTICE BREYER'S remaining arguments for avoiding the facial challenge are straw men. See *ante*, at 625 (if § 441a(d)(3) were invalidated in its entirety, other FECA provisions that the Party has not challenged might apply to coordinated party expenditures); *ibid.* (if § 441a(d)(3) were upheld as to coordinated expenditures but invalidated as to independent expenditures, issues of severability would be raised). That resolution of the primary question in this case (the constitutionality of § 441a(d)(3) with respect to all expenditures) might generate issues not previously considered (such as severability) is no reason for not deciding the question itself. Without suggesting that remand is the only appropriate way to deal with possible corollary matters in this case or that these arguments have merit, I point out that we can, of course, decide the central question without ruling on the issues that concern JUSTICE BREYER.

The constitutionality of limits on coordinated expenditures by political parties is squarely before us. We should address this important question now, instead of leaving political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage.

II

A

Critical to JUSTICE BREYER'S reasoning is the distinction between contributions[3] and independent expenditures that we first drew in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). Though we said in *Buckley* that controls on spending and giving "operate in an area of the most fundamental First Amendment activities," *id.*, at 14, we invalidated the expenditure limits of FECA and upheld the Act's contribution limits. The justification we gave for the differing results was this: "The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," *id.*, at 19, whereas "limitation[s] upon the amount that any one person or group may contribute to a candidate or political committee entai[l] only a marginal restriction upon the contributor's ability to engage in free communication," *id.*, at 20-21. This conclusion was supported mainly by two assertions

[3] Coordinated expenditures are by statute categorized as contributions. See 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate").

about the nature of contributions: First, though contributions may result in speech, that speech is by the candidate and not by the contributor; and second, contributions express only general support for the candidate but do not communicate the reasons for that support. *Id.*, at 21. Since *Buckley*, our campaign finance jurisprudence has been based in large part on this distinction between contributions and expenditures. See, *e.g.*, *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259-260, 261-262 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 497 (1985); *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 196, (1981) (plurality opinion).

In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: "[C]ontributions and expenditures are two sides of the same First Amendment coin." *Buckley v. Valeo*, 424 U.S., at 241 (concurring in part and dissenting in part).[4] Contributions and expenditures both involve core First Amendment expression because they further the "[d]iscussion of public issues and debate on

[4] Three Members of the *Buckley* Court thought the distinction untenable at the time, see 424 U.S., at 241 (Burger, C. J., concurring in part and dissenting in part); *id.*, at 261 (White, J., concurring in part and dissenting in part); *id.*, at 290 (Blackmun, J., concurring in part and dissenting in part), and another Member disavowed it subsequently, see *Federal Election Comm'n v. NCPAC*, 470 U.S. 480, 518-521 (1985) (Marshall, J., dissenting). Cf. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990) (STEVENS, J., concurring) (stating that distinction "should have little, if any, weight in reviewing corporate participation in candidate elections").

the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." *Id.*, at 14. When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. Indeed, the individual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual. The contribution of funds to a candidate or to a political group thus fosters the "free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), just as an expenditure does.[5]

Giving and spending in the electoral process also involve basic associational rights under the First Amendment. See BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045, 1064 (1985) (hereinafter BeVier). As we acknowledged in *Buckley*, "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" 424 U.S., at 15 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Political associations allow

[5] See H. Alexander, Money in Politics 234 (1972): "The constitutional arguments against limiting campaign spending also apply against limiting contributions; specifically, it is the right of an individual to spend his money to support a congenial viewpoint. . . . Some views are heard only if interested individuals are willing to support financially the candidate or committee voicing the position. To be widely heard, mass communications may be necessary, and they are costly. By extension, then, the contribution of money is a contribution to freedom of political debate."

citizens to pool their resources and make their advocacy more effective, and such efforts are fully protected by the First Amendment. *Federal Election Comm'n v. NCPAC*, *supra*, at 494. If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy. See *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 296 (1981) ("To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association"). And if an individual cannot be subject to such limits, neither can political associations be limited in their ability to give as a means of furthering their members' viewpoints. As we have said, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).[6]

[6] To illustrate the point that giving and spending in the political process implicate the same First Amendment values, I note that virtually everything JUSTICE BREYER says about the importance of free independent expenditures applies with equal force to coordinated expenditures and contributions. For instance, JUSTICE BREYER states that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure." *Ante*, at 615-616. "Coordinated" expression by political parties, of course, shares those precise attributes. The fact that an expenditure is prearranged with the candidate—presumably to make it more effective in the election—does not take away from its fundamental democratic purposes.

Turning from similarities to differences, I can discern only one potentially meaningful distinction between contributions and expenditures. In the former case, the funds pass through an intermediary—some individual or entity responsible for organizing and facilitating the dissemination of the message—whereas in the latter case they may not necessarily do so. But the practical judgment by a citizen that another person or an organization can more effectively deploy funds for the good of a common cause than he can ought not deprive that citizen of his First Amendment rights. Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with like-minded persons. A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance. As one commentator cautioned, "let us not lose sight of the speech." Powe, Mass Speech and the Newer First Amendment, 1982 S. Ct. Rev. 243, 258.

Echoing the suggestion in *Buckley* that contributions have less First Amendment value than expenditures because they do not involve speech by the donor, see 424 U.S., at 21, the Court has sometimes rationalized limitations on contributions by referring to contributions as "speech by proxy." See, *e.g.*, *California Medical Assn. v. Federal Election Comm'n*, 453 U.S., at 196 (Marshall, J.) (plurality opinion). The "speech by proxy" label is, however, an ineffective tool for distinguishing contributions from expenditures. Even in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the

spender's message—for instance, an advertising agency or a television station. See Powe, *supra*, at 258-259. To call a contribution "speech by proxy" thus does little to differentiate it from an expenditure. See *Buckley v. Valeo*, *supra*, at 243-244, and n. 7 (Burger, C. J., concurring in part and dissenting in part). The only possible difference is that contributions involve an extra step in the proxy chain. But again, that is a difference in form, not substance.

Moreover, we have recently recognized that where the "proxy" speech is endorsed by those who give, that speech is a fully protected exercise of the donors' associational rights. In *Federal Election Comm'n v. NCPAC*, we explained:

> "[T]he 'proxy speech' approach is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organizatio[n] and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." 470 U.S., at 495.

The other justification in *Buckley* for the proposition that contribution caps only marginally restrict speech—that is, that a contribution signals only general support for the candidate but indicates nothing about the reasons for that support—is similarly unsatisfying. Assuming the assertion is descriptively accurate (which is certainly questionable), it still cannot mean that giving is less important than spending in terms of the

First Amendment. A campaign poster that reads simply "We support candidate Smith" does not seem to me any less deserving of constitutional protection than one that reads "We support candidate Smith because we like his position on agriculture subsidies." Both express a political opinion. Even a pure message of support, unadorned with reasons, is valuable to the democratic process.

In sum, unlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits. The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy. I think that the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it, as JUSTICE BREYER and JUSTICE KENNEDY do.

B

Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: Both forms of speech are central to the First Amendment. Curbs on protected speech, we have repeatedly said, must be

strictly scrutinized. See *Federal Election Comm'n v. NCPAC, supra*, at 501; *Citizens Against Rent Control/ Coalition for Fair Housing v. Berkeley*, 454 U.S., at 294; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).[7] I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process, like § 441a(d)(3), are unconstitutional.

The formula for strict scrutiny is, of course, well established. It requires both a compelling governmental interest and legislative means narrowly tailored to serve that interest. In the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption, see *Federal Election Comm'n v. NCPAC*, 470 U.S., at 496-497, and we have narrowly defined "corruption" as a "financial *quid pro quo*: dollars for political favors," *id.*, at 497.[8]

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[7] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court purported to scrutinize strictly the contribution provisions as well as the expenditure rules. See *id.*, at 23 (FECA's contribution and expenditures limits "both implicate fundamental First Amendment interests"); *id.*, at 25 (contribution limits, like expenditure limits, are " 'subject to the closest scrutiny' " (citation omitted)). It has not gone unnoticed, however, that we seemed more forgiving in our review of the contribution provisions than of the expenditure rules. See, *e.g.*, *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 196 (1981) (plurality opinion) (contributions are "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection"). But see *id.*, at 201-202 (Blackmun, J., concurring in part and concurring in judgment) (under *Buckley*, there is no lesser standard of review for contributions as opposed to expenditures).

[8] As I explain in Part III, *infra*, the interest in preventing corruption is inapplicable when the subject of the regulation is a

As for the means-ends fit under strict scrutiny, we have specified that "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Federal Election Comm'n v. MCFL*, 479 U.S., at 265.

In *Buckley*, we expressly stated that the means adopted must be "closely drawn to avoid unnecessary abridgment" of First Amendment rights. 424 U.S., at 25. But the *Buckley* Court summarily rejected the argument that, because less restrictive means of preventing corruption existed—for instance, bribery laws and disclosure requirements—FECA's contribution provisions were invalid. Bribery laws, the Court said, "deal with only the most blatant and specific attempts of those with money to influence governmental action," *id.*, at 28, suggesting that those means were inadequate to serve the governmental interest. With respect to disclosure rules, the Court admitted that they serve "many salutary purposes" but said that Congress was "entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant." *Ibid.* Finally, the Court noted that contribution caps leave people free to engage in independent political speech, to volunteer their services, and to contribute money to a "limited but nonetheless substantial extent." *Ibid.*

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political party. My analysis here is more general, however, and applies to all individuals and entities subject to campaign finance limits.

In my opinion, FECA's monetary caps fail the narrow tailoring test. Addressing the constitutionality of FECA's contribution caps, the *Buckley* appellants argued:

> "If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." Brief for Appellants in *Buckley v. Valeo*, O.T.1975, Nos. 75-436 and 75-437, pp. 117-118.

The *Buckley* appellants were, to my mind, correct. Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their prohibitions.

Section 441a(d)(3), in particular, suffers from this infirmity. It flatly bans all expenditures by all national and state party committees in excess of certain dollar limits, without any evidence that covered committees who exceed those limits are in fact engaging, or likely to engage, in bribery or anything resembling it. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 689 (1990) (SCALIA, J., dissenting) (where statute "extends to speech that has the mere *potential* for producing social harm" it should not be held to satisfy

the narrow tailoring requirement (emphasis in original)). Thus, the statute indiscriminately covers the many conceivable instances in which a party committee could exceed the spending limits without any intent to extract an unlawful commitment from a candidate. Cf. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (State may not, in effort to stop fraud in charitable solicitations, "lump" truly charitable organizations "with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other"). As one commentator has observed: "[I]t must not be forgotten that a large number of contributions are made without any hope of specific gain: for the promotion of a program, because of enthusiasm for a candidate, or to promote what the giver vaguely conceives to be the national interest." L. Overacker, Money in Elections 192 (1974).

In contrast, federal bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under FECA, and disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage. Cf. *Schaumburg v. Citizens for a Better Environment*, *supra*, at 637-638 (explaining that "less intrusive" means of preventing fraud in charitable solicitation are "the penal laws [that can be] used to punish such conduct directly" and "disclosure of the finances of charitable organizations"). In light of these alternatives, wholesale limitations that cover contributions having nothing to do with bribery—but with speech central to the First Amendment—are not narrowly tailored.

Buckley's rationale for the contrary conclusion, see *supra*, at 641-642, is faulty. That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored. The First Amendment limits Congress to legislative measures that do not abridge the Amendment's guaranteed freedoms, thereby constraining Congress' ability to accomplish certain goals. Similarly, that other modes of expression remain open to regulated individuals or groups does not mean that a statute is the least restrictive means of addressing a particular social problem. A statute could, of course, be more restrictive than necessary while still leaving open some avenues for speech.[9]

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[9] JUSTICE STEVENS submits that we should "accord special deference to [Congress'] judgment on questions related to the extent and nature of limits on campaign spending," *post*, at 650, a stance that the Court of Appeals also adopted, see 59 F.3d 1015, 1024 (CA 10 1995). This position poses great risk to the First Amendment, in that it amounts to letting the fox stand watch over the henhouse. There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment. See generally BeVier 1074-1081. What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it. See *id.*, at 1075 (" 'Courts must police inhibitions on . . . political activity because we cannot trust elected officials to do so' " (emphasis deleted)) (quoting J. Ely, Democracy and Distrust 106 (1980)). See also R. Winter, Political Financing and the Constitution, 486 Annals Am. Acad. Pol. & Soc. Sci. 34, 40, 48 (1986). Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups. See BeVier 1078-1080. When Congress seeks to ration political

III

Were I convinced that the *Buckley* framework rested on a principled distinction between contributions and expenditures, which I am not, I would nevertheless conclude that § 441a(d)(3)'s limits on political parties violate the First Amendment. Under *Buckley* and its progeny, a substantial threat of corruption must exist before a law purportedly aimed at the prevention of corruption will be sustained against First Amendment attack.[10] Just as some of the monetary limits in the *Buckley* line of cases were held to be invalid because the Government interest in stemming corruption was

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expression in the electoral process, we ought not simply acquiesce in its judgment.

[10] See *Buckley v. Valeo*, 424 U.S., at 45-47 (striking down limits on independent expenditures because the "advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption"); *Federal Election Comm'n v. MCFL*, 479 U.S. 238, 263, (1986) (invalidating caps on campaign expenditures by incorporated political associations because spending by such groups "does not pose [any] threat" of corruption); *Federal Election Comm'n v. NCPAC*, 470 U.S., at 498 (striking down limits on independent expenditures by political action committees because "a *quid pro quo* for improper commitments" in that context was a "hypothetical possibility"); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 297 (1981) (stating that "*Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures*" because anticorruption rationale is inapplicable); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (concluding that limits on referendum speech by corporations violate First Amendment because "[t]he risk of corruption . . . simply is not present").

inadequate under the circumstances to justify the restrictions on speech, so too is § 441a(d)(3) invalid.[11]

The Government asserts that the purpose of § 441a(d)(3) is to prevent the corruption of candidates and elected representatives by party officials. The Government does not explain precisely what it means by "corruption," however;[12] the closest thing to an explanation the Government offers is that "corruption" is "'the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.'" Brief for Respondent 35 (quoting *Buckley v. Valeo*, 424 U.S., at 25). We so defined corruption in *Buckley* for purposes of reviewing ceilings on giving or spending by individuals, groups, political committees, and candidates. See *id.*, at 23, 35, 39. But we did not in that case consider the First Amendment status of FECA's provisions dealing with political parties. See *id.*, at 58, n. 66, 59, n.67.

As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. See Nahra, Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities, 56 Ford. L.Rev. 53, 105-106 (1987). What could it mean for a party to "corrupt" its candi-

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[11] While JUSTICE BREYER chides me for taking the position that I would not adhere to *Buckley*, see *ante*, at 626, and suggests that my approach to this case is thus insufficiently "cautiou[s]," *ibid.*, he ignores this Part of my opinion, in which I explain why limits on coordinated expenditures are unconstitutional *even under the* Buckley *line of precedent.*

[12] Nor, for that matter, does JUSTICE BREYER explain what sorts of *quid pro quos* a party could extract from a candidate. Cf. *ante*, at 615.

date or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process." *Federal Election Comm'n v. NCPAC*, 470 U.S., at 497. For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system. To borrow a phrase from *Federal Election Comm'n v. NCPAC*: "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [political groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id.*, at 498. Cf. *Federal Election Comm'n v. MCFL*, 479 U.S., at 263 (suggesting that "[v]oluntary political associations do not . . . present the specter of corruption").

The structure of political parties is such that the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less than the threat of individuals or other groups doing so. See Nahra, *supra*, at 97-98 (citing F. Sorauf, Party Politics in America 15-18 (5th ed. 1984)). American political parties, generally speaking, have numerous members with a wide variety of interests, Nahra, *supra*, at 98, features necessary for success in majoritarian elections. Consequently, the influence of any one person or the importance of any single issue within a political party is

significantly diffused. For this reason, as the Party's *amici* argue, see Brief for Committee for Party Renewal et al. as *Amicus Curiae* 16, campaign funds donated by parties are considered to be some of "the cleanest money in politics." J. Bibby, Campaign Finance Reform, 6 Commonsense 1, 10 (Dec.1983). And, as long as the Court continues to permit Congress to subject individuals to limits on the amount they can give to parties, and those limits are uniform as to all donors, see 2 U.S.C. § 441a(a)(1), there is little risk that an individual donor could use a party as a conduit for bribing candidates.

In any event, the Government, which bears the burden of "demonstrat[ing] that the recited harms are real, not merely conjectural," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994), has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures. Cf. *ante*, at 618 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"). And insofar as it appears that Congress did not actually enact § 441a(d)(3) in order to stop corruption by political parties "but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending," *ibid.* (citing *Buckley v. Valeo*, *supra*, at 57), the statute's ceilings on coordinated expenditures are as unwarranted as the caps on independent expenditures.

In sum, there is only a minimal threat of "corruption," as we have understood that term, when a political party spends to support its candidate or to

oppose his competitor, whether or not that expenditure is made in concert with the candidate. Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic. To the contrary, the danger to the Republic lies in Government suppression of such activity. Under *Buckley* and our subsequent cases, § 441a(d)(3)'s heavy burden on First Amendment rights is not justified by the threat of corruption at which it is assertedly aimed.

* * *

To conclude, I would find § 441a(d)(3) unconstitutional not just as applied to petitioners, but also on its face. Accordingly, I concur only in the Court's judgment.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

In my opinion, all money spent by a political party to secure the election of its candidate for the office of United States Senator should be considered a "contribution" to his or her campaign. I therefore disagree with the conclusion reached in Part III of the principal opinion.

I am persuaded that three interests provide a constitutionally sufficient predicate for federal limits on spending by political parties. First, such limits serve the interest in avoiding both the appearance and the reality of a corrupt political process. A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked.

That interdependency creates a special danger that the party—or the persons who control the party—will abuse the influence it has over the candidate by virtue of its power to spend. The provisions at issue are appropriately aimed at reducing that threat. The fact that the party in this case had not yet chosen its nominee at the time it broadcast the challenged advertisements is immaterial to the analysis. Although the Democratic and Republican nominees for the 1996 Presidential race will not be selected until this summer, current advertising expenditures by the two national parties are no less contributions to the campaigns of the respective frontrunners than those that will be made in the fall.

Second, these restrictions supplement other spending limitations embodied in the Federal Election Campaign Act of 1971, which are likewise designed to prevent corruption. Individuals and certain organizations are permitted to contribute up to $1,000 to a candidate. 2 U.S.C. § 441a(a)(1)(A). Since the same donors can give up to $5,000 to party committees, § 441a(a)(1)(C), if there were no limits on party spending, their contributions could be spent to benefit the candidate and thereby circumvent the $1,000 cap. We have recognized the legitimate interest in blocking similar attempts to undermine the policies of the Act. See *California Medical Assn. v. Federal Election Com m'n*, 453 U.S. 182, 197-199 (1981) (plurality opinion) (approving ceiling on contributions to political action committees to prevent circumvention of limitations on individual contributions to candidates); *id.*, at 203 (Blackmun, J., concurring in part and concurring in judgment); *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (*per curiam*) (approving limitation on total contributions by

an individual in connection with an election on same rationale).

Finally, I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in *Buckley*, "money is not always equivalent to or used for speech, even in the context of political campaigns." *Id.*, at 263 (opinion concurring in part and dissenting in part). It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment. See *id.*, at 262-266.

Congress surely has both wisdom and experience in these matters that is far superior to ours. I would therefore accord special deference to its judgment on questions related to the extent and nature of limits on campaign spending.* Accordingly, I would affirm the judgment of the Court of Appeals.

* One irony of the case is that both the Democratic National Party and the Republican National Party have sided with petitioners in challenging a law that Congress has the obvious power to change. See Brief for Democratic National Committee as *Amicus Curiae*; Brief for Republican National Committee as *Amicus Curiae*.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433, 93-1434

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANT/APPELLEE/
CROSS-APPELLANT

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE, DOUGLAS JONES,
DEFENDANTS/COUNTER-CLAIMANTS/APPELLANTS/
CROSS-APPELLEES

[Filed: June 23, 1995
Rehearing Denied: Sept. 6, 1995]

Before HENRY and LOGAN, Circuit Judges, and REED, District Judge.*

LOGAN, Circuit Judge.

The Federal Election Commission (FEC) appeals from the dismissal on the merits of its underlying suit filed against the Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones (collectively the Committee) alleging violations of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-442. The Committee cross-appeals from

* The Honorable Edward L. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

the dismissal as moot of its counterclaim challenging the constitutionality of the FECA expenditure limitations. We hold that the Committee expenditures at issue did violate the coordinated expenditure limitation in 2 U.S.C. § 441a(d)(3). We also reach the constitutional issue and hold that § 441a(d)(3) does not violate the Committee's First Amendment rights.

This action stems from the 1986 United States senatorial campaign in Colorado, and pre-election spending by the Committee. In January 1986, then-Congressman Timothy E. Wirth had registered with the FEC as a candidate for the Democratic nomination for the U.S. Senate. Several months later, but before either political party had nominated senatorial candidates, the Committee spent $15,000 for a radio advertisement directed at Wirth's announced candidacy ("Wirth Facts # 1").[1] This spending prompted the

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[1] Wirth Facts # 1 read:

Paid for by the Colorado Republican State Central Committee.

Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

I Jt. App. 95-96.

Colorado Democratic Party's administrative complaint with the FEC alleging that it was an "expenditure in connection with" the general election campaign of a candidate for federal office in violation of the spending limits set out in FECA § 441a(d)(3).

The FEC made a probable cause determination that the Committee violated the FECA. When the parties were unable to reach a settlement the FEC filed suit. The FEC alleged that the Committee failed to report the amount spent on the anti-Wirth publicity as an "expenditure in connection with" the general election campaign, in violation of FECA §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). The Committee counterclaimed, alleging that the FECA was an unconstitutional infringement on its First Amendment rights. In ruling on the parties' cross motions for summary judgment, the district court dismissed the underlying action after finding no FECA violation, and dismissed the counterclaim as mooted by its merits ruling. These appeals followed.

I

We first address whether the district court correctly concluded that the Committee did not violate the FECA. We review de novo a district court's grant of summary judgment using the same legal standards as the district court. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1237 (10th Cir.), *cert. denied*, 506 U.S. 832, 113 S. Ct. 98, 121 L.Ed.2d 58 (1992).

A

The FECA regulates contributions made to federal candidates and political parties, and expenditures made

by persons and political committees. It also imposes recordkeeping and reporting requirements. The Committee acknowledges that it is subject to the FECA as a federally registered committee of the Colorado Republican Party.

The statute limits monetary contributions and expenditures by state and national political party committees as follows:

> **(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office**
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> . . . . .
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds–

> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of–
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000.

2 U.S.C. § 441a(d)(1) and (3). A state political party committee may assign to a designated agent (including a national party committee) the right to make the expenditures the state party could have made. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41-43, 102 S.Ct. 38, 46-48, 70 L.Ed.2d 23 (1981) (*DSCC*). Here the Committee expended funds on the anti-Wirth publicity after assigning to the National Republican Senatorial Committee the authority to make all of the expenditures—$103,248—it was allowed under § 441a(d)(3) for the 1986 U.S. Senate election. *See* I Jt.App. 4, 14; II *id.* 473. The Committee did not report the $15,000 anti-Wirth publicity expense under 2 U.S.C. § 434(b)(4)(H)(iv),[2] instead characteriz-

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[2] 2 U.S.C. § 434(b)(4)(H)(iv) reads in part:

> **(b) Contents of reports**
>
> Each report under this section shall disclose—
>
> . . . . . .
>
> **(4)** for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:
>
> . . . . . .

ing it as an expense for "Voter Information to Colorado Voters—Advertising." II App. 478, ¶ A. The narrow issue is whether the anti-Wirth publicity expense was an "expenditure in connection with the general election campaign" pursuant to § 441a(d)(3) and should have been reported accordingly. If so, the Committee exceeded the § 441a(d)(3) monetary ceiling.

As relevant here, the FECA addresses two types of campaign expenditures: independent and coordinated.[3] A coordinated expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S. Ct. 612, 648 n. 53, 46 L.Ed.2d 659 (1976). *See also* 11 C.F.R. §110.7(b)(4). Because political parties are considered incapable of making independent expenditures, the district court correctly found that the anti-Wirth publicity expense was a coordinated expenditure. *See DSCC*, 454 U.S. at 29 n. 1, 102 S. Ct. at 41 n. 1. If that spending was an "expenditure [ ] in connection with" the campaign it

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(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a(d) of this title; and

(v) any other disbursements.

[3] An independent expenditure is "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

was subject to the monetary limitations at § 441a(d). *Id.* The district court concluded that the Committee's coordinated expenditure on the anti-Wirth publicity was not made in connection with the 1986 Colorado senatorial campaign, and therefore was not subject to the § 441a(d)(3) limits.

B

The FECA does not clearly manifest the meaning Congress intended to attach to the "expenditures in connection with" language in § 441a(d)(3). Acknowledging that there were no controlling or persuasive cases interpreting that section, the district court relied upon *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*), and its interpretation of FECA § 441b. Section 441b[4] restricts

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[4] 2 U.S.C. § 441b provides in relevant part as follows:

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank,

the contributions and expenditures of national banks, corporations, or labor organizations. The Supreme Court in *MCFL* considered whether Massachusetts Citizens for Life, Inc., a nonprofit, nonstock corporation, by financing a newsletter urging voter support for identified pro-life candidates, violated the "independent spending" limitations in § 441b. *Id.* at 241, 107 S. Ct. at 619. Interpreting the term "expenditure in connection with any election" the Court held that the expenditure "must constitute 'express advocacy' in order to be

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or labor organization, as the case may be, prohibited by this section.

. . . .

(b)(2) For purposes of this section and section 791 (h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

subject to the prohibition of § 441b." *Id.* at 249, 107 S. Ct. at 623.

MCFL relied upon the *Buckley* opinion's interpretation of a limitation on independent expenditures "relative to" a clearly identifiable candidate. To avoid invalidating on vagueness grounds what was then FECA § 608(e)(1), the *Buckley* Court held the term encompassed only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44, 96 S. Ct. at 646-47. The opinion clarified in a footnote that this construction would restrict the application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* n. 52. *MCFL* adopted the same definition, referencing the same footnote, for purposes of § 441b's independent spending limitation. 479 U.S. at 249, 107 S. Ct. at 623.

The district court, noting the identity of the "expenditures in connection with" language in § 441b and in § 441a(d)(3), concluded that the anti-Wirth publicity was not express advocacy and therefore not governed by the § 441a(d)(3) limitations. The district court relied in part on a common law rule of statutory construction that identical words used in different sections of the same statute generally should be given the same meaning. However, the Supreme Court has also stated that "the presumption readily yields to the controlling force of the circumstance that words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helver-*

ing v. Stockholms Enskilda Bank, 293 U.S. 84, 87, 55 S. Ct. 50, 51, 79 L.Ed. 211 (1934).

Further, we cannot overlook a significant distinction between *Buckley* and *MCFL* and the instant case. The *Buckley* opinion distinguished between independent expenditures—regulated by then FECA § 608(e)(1)—and coordinated expenditures. The *Buckley* opinion unequivocally stated that controlled or coordinated expenditures are treated as "contributions rather than expenditures" under the FECA.[5] 424 U.S. at 46-47 & n. 53, 96 S. Ct. at 648 & n. 53. Although *Buckley* found the ceiling on independent expenditures failed to serve substantial enough government interests to be constitutional, it reached the opposite conclusion as to the limitations on expenditures by national or state political parties. *Id.* at 55-59 & n. 67, 96 S. Ct. at 652-54 & n. 67 ("Does 18 U.S.C. § 608(f) (1970 ed., Supp. IV) violate [constitutional] rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office? Answer: NO, as to the Fifth Amendment challenge advanced by appellants."). *Buckley* accepted the FECA's treatment of expenditures by national and state committees of political parties as contributions, as have subsequent opinions of the Supreme Court. *See DSCC*, 454 U.S. 27, 29 n.1, 102 S. Ct. 38, 41 n. 1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such 'independent' expen-

[5] Coordinated expenditures are treated as campaign contributions that must be reported pursuant to § 441a(a)(7)(B)(i).

ditures by the national and state party committees."). Similarly, *MCFL* made the same distinction when interpreting the meaning of independent expenditure limits in § 441b. *MCFL*, 479 U.S. at 259-60, 107 S. Ct. at 628-29.

Subsequent amendments to the FECA include "expressly advocating" into the definition of independent expenditures. *See* 2 U.S.C. § 431(17). Coordinated expenditures of political parties, however, are not defined in this manner. *See id.* § 431(9)(B)(ix); *cf. id.* § 431(8)(B)(v), (x), (xii) (what is not a contribution). This is some evidence of congressional intent that the phrases are not intended to have the same meaning.

The distinction between independent expenditures and political party expenditures that are deemed to be contributions, and their different treatment by the Supreme Court, negates the necessity that "expenditures in connection with" be construed identically in different sections of the FECA. However, the meaning of "expenditures in connection with" is not perfectly clear, else the Court in *MCFL* would not have had to cabin its meaning under § 441b in the manner it did. The question then becomes whether we must construe the phrase as narrowly as the Supreme Court did in *MCFL* in order to uphold its validity.

C

The FEC has issued advisory opinions interpreting the "expenditures in connection with" phrase in § 441a(d)(3) in a manner different than that adopted by the district court and urged upon us by the Committee. We believe this is an appropriate circumstance in which to follow the Supreme Court's admonishment that "if

the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (footnote omitted); *see also DSCC*, 454 U.S. at 37, 102 S. Ct. at 44-45 (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded").[6]

FEC Advisory Opinion 1984-15 addressed questions raised by the Republican Party regarding spending for a series of television ads denigrating the potential Democratic presidential candidates, relating to an upcoming election. The FEC responded to a specific question whether such spending was within the limitations of § 441a(d).

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made

[6] We note that one of the reasons the *Buckley* opinion gave for its "express advocacy" restrictive interpretation of § 608(e)(1)'s "relative to" language was that most who were subject to the statute's criminal sanctions had no right to obtain an advisory opinion of the FEC. *See* 424 U.S. at 40 n.47, 96 S. Ct. at 645 n.47. It noted that only candidates, federal office holders and *political committees* had that right. *Id.* Section 441a(d), at issue before us, applies only to political committees; thus all to whom it applies can secure advisory opinions from the FEC.

> with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (May 31, 1984) (footnote omitted). The opinion then concluded that the spending in question was a coordinated expenditure subject to the limitations in § 441a(d)(2).

Advisory Opinion 1985-14 responded to questions from a Democratic Congressional Campaign Committee regarding proposed publicity focusing on a number of congressmen, not all with announced opposition candidates. A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (May 30, 1985). The opinion endorsed Advisory Opinion 1984-15 with its construction of § 441a(d) as regulating expenditures that "both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message."[7]

The FEC has "primary and substantial responsibility for administering and enforcing" the FECA. *Buckley*, 424 U.S. at 109, 96 S. Ct. at 677-78. The FEC argues that its construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message is a reasonable one to which we must defer. Viewing the

[7] Advisory Opinion 1978-46 appears more restrictive; it can be read to adopt the express advocacy position. A.O. 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978). But even if the more recent decisions represent a change in position by the FEC we must still give the current view deference if the current construction is reasonable. *Rust v. Sullivan*, 500 U.S. 173, 186-87, 111 S. Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991).

party expenditures as contributions, as we must, we agree.

"[T]he primary interest served by the Act is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC*, 454 U.S. at 41, 102 S. Ct. at 47. The Supreme Court cases have distinguished between the potential for corruption that attaches to contributions and coordinated expenditures, and those that might develop from independent expenditures, finding less inherent risk in the latter. Our analysis, therefore, with respect to controls on coordinated expenditures and contributions under § 441a is different than that required for § 441b.

Section § 441a(d) addresses the concern that large contributors to political parties will exert undue influence on a candidate if elected to office. The monetary ceiling on coordinated expenditures by political organizations diminishes the potential of such undue influence but preserves the important role of political parties. *See DSCC*, 454 U.S. at 41, 102 S. Ct. at 46-47. In contrast, the purpose behind § 441b is to prevent corporate and labor expenditures from effectively acting as "political war chests" on behalf of candidates, because these organizations could use funds "amassed in the economic marketplace . . . [for] unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257, 107 S. Ct. at 627. The FECA thus provides different regulations tailored to different perceived

evils.[8] Independent expenditures are theoretically unlimited but such expenditures in excess of low limits must be reported, along with identification of those who contributed more than $200. Contribution limits still apply. Giving deference to the FEC's interpretation, we hold that § 441a(d)(3) applies to coordinated spending that involves a clearly identified candidate and an electioneering message, without regard to whether that message constitutes express advocacy.

D

The Committee does not seriously contest that the anti-Wirth publicity was directed at a clearly identified candidate. "Wirth Facts # 1" referenced Wirth's senatorial aspirations and challenged his personal integrity and campaign statements in the context of the current election.[9] Wirth was not yet the Democratic nominee, but the FECA regulates coordinated expenditures made before the primary election. A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766. The Committee's objective to elect the eventual Republican candidate is not diminished because a Democratic nominee has not emerged. *See Buckley*, 424 U.S. at 79,

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[8] We have already discussed how subsequent FECA amendments have adopted the "express advocacy" criteria to differentiate between independent and coordinated expenditures.

[9] *See also* 2 U.S.C. § 431(18) which reads:

> The term "clearly identified" means that—
>
> (A) the name of the candidate involved appears;
>
> (B a photograph or drawing of the candidate appears; or
>
> (C) the identity of the candidate is apparent by unambiguous reference.

96 S. Ct. at 663 (major purpose of expenditures by candidates and political committees "is the nomination or election of a candidate").

We next consider whether "Wirth Facts # 1" contained an electioneering message.[10] Advisory Opinion 1984-15 examined proposed television advertising by the Republican National Committee that would "question or challenge the candidate's statements, position, or record." The FEC concluded that the

> clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. . . . These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made

[10] We agree with the district court that the message in "Wirth Facts # 1" would not constitute express advocacy within the narrow definition of *Buckley* and *MCFL*. It lacks the express words "vote for" or "vote against," or words of similar import, although it comes close when the ad suggests that an identified candidate distorted his voting record.

> with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (citation and footnotes omitted). The next year, the FEC relied upon that construction in rendering Advisory Opinion 1985-14 to the Democratic Congressional Campaign Committee stating that "[e]lectioneering messages include statements 'designed to urge the public to elect a certain candidate or party.'" A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587, 77 S. Ct. 529, 539, 1 L.Ed.2d 563 (1957)).

Any reasonable reading of "Wirth Facts # 1," which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to "diminish" public support for Wirth and "garner support" for the unnamed Republican nominee. "Wirth Facts # 1" unquestionably contained an electioneering message. We conclude that the anti-Wirth publicity was an "expenditure in connection with" the 1986 Colorado senatorial election because it named both a clearly identifiable candidate and contained an electioneering message. The Committee, therefore, violated the FECA by making a § 441a(d)(3) expenditure after delegating to the National Republican Senatorial Committee the authority to spend all of the Committee's available funding for the 1986 Colorado Senate race.

II

We next consider the Committee's constitutional challenges to the FECA. The Committee asserts that

the monetary caps in § 441a(d)(3) violate its First Amendment guarantees of freedom of speech and association. The Committee focuses on the alleged absence of a compelling governmental interest served by the restrictions in § 441a(d)(3) and also asserts that the statute discriminates based upon content. The FEC's position is that *Buckley* and later cases endorse distinctions between independent expenditures and contributions, and that other FECA contribution ceilings have consistently been upheld as constitutional by the Supreme Court. We agree with the FEC that § 441a(d)(3) is a permissible burden on speech and association.

The primary purpose of the contribution and expenditure caps in the FECA are to prevent corruption or the appearance of corruption. *Buckley* 424 U.S. at 25-26, 96 S. Ct. at 637-38. The FECA starts from the premise that political committees may make only minimal expenditures in connection with campaigns, § 441a(a) (dollar limits on contributions), then creates one exception at § 441a(d)(3) (coordinated expenditure limits for certain political committees made in connection with federal election campaigns). *DSCC*, 454 U.S. at 28-29 n. 1, 102 S. Ct. at 40-41 n. 1; 11 C.F.R. § 110.7(b); *see also* 2 U.S.C. § 431(14)-(16). This exception allows for greater monetary support by political parties than would otherwise be permitted by § 441a(a,. The coordinated expenditures permitted by § 441a(d)(3) are treated for purposes of reporting and monetary limitations as contributions from the political committee to the candidate, § 441a(a)(7)(B)(i); *see also* § 434(b)(4)(H)(iv), and fall within the contribution ceilings contained in § 441a(a). *See Buckley*, 424 U.S. at 46, 96 S. Ct. at 647-48; *FEC v.*

National Political Action Committee, 470 U.S. 480, 492, 105 S. Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) (*NCPAC*).

The same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees.[11] The opportunity for abuse is greater when the contributions (or in the instant case, coordinated expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures. *See Buckley*, 424 U.S. at 26-27, 96 S. Ct. at 638-39; *NCPAC*, 470 U.S. at 497, 105 S. Ct. at 1468-69. The Committee, stressing the benefits of party discipline and the broad interests of party success, argues that the dangers of domination of candidates by large individual donors do not apply to party expenditures. But party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures. The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized

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[11] We acknowledge that *Buckley* upheld then 18 U.S.C. § 608(f) as constitutional when challenged as discriminatory under the Fifth Amendment, and not the First Amendment, which is the basis for the Committee's constitutional challenge here. *Buckley*, 424 U.S. at 59 n. 67, 96 S. Ct. at 654 n. 67. However, *MCFL* adopted much of the reasoning in *Buckley* in analyzing the First Amendment challenges to § 441b. We do not, therefore, discount the importance of *Buckley* in the context of our First Amendment analysis.

political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties. This case is, therefore, ideally postured for deference to the congressional will.

The Supreme Court has endorsed the government's interest in curtailing large campaign contributions as legitimate. In addition to preventing corruption or the appearance of corruption, these restrictions "equalize the relative ability of all citizens to affect the outcome of elections," *Buckley*, 424 U.S. at 26, 96 S. Ct. at 638, and to a degree cap campaign costs and increase accessibility to our political system. *Id.* The Court has distinguished between restrictions on contributions and restrictions on independent expenditures and then invalidated spending restrictions while upholding contribution limits. *Id.* at 58-59, 96 S. Ct. at 653-54.

By treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, "secur[ing] a political *quid pro quo* from current and potential office holders." *Id.* at 26-27, 96 S. Ct. at 638. Contribution limits regulate the quantity of political speech, but do not foreclose speech or political association. We do not see this monetary cap as content based; it is rather a consequence of the funding source. We uphold as constitutional, against the Committee's First Amendment challenge, the spending limits in § 441a(d)(3).

We REVERSE and REMAND with instructions that the district court enter judgment in favor of the FEC, and for a determination under 2 U.S.C. § 437g(a)(6) of the appropriate civil penalty.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIV. A. NO. 89 N 1159

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE, ET AL., DEFENDANTS

[Filed: Aug. 30, 1993]

ORDER AND MEMORANDUM OF DECISION

NOTTINGHAM, District Judge.

This case involves alleged violations of the Federal Elections Campaign Act of 1971, as amended, 2 U.S.C.A. §§ 431-456 (West 1985) (the "Act"). Plaintiff Federal Election Commission sued Defendant Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones, claiming that defendants had failed to report a certain payment as an "expenditure," as required by 2 U.S.C.A. § 441a(d)(3). Plaintiff seeks declaratory, civil, and injunctive relief under the Act. The matter comes before the court on (1) "Defendants' Motion for Summary Judgment" filed May 15, 1990, and

(2) "Plaintiff's Motion for Summary Judgment" filed July 6, 1990. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1976).

FACTS

Defendant Colorado Republican Federal Campaign Committee (the "Committee") is an unincorporated political association. It works to advance the goals and values of the Republican Party in the State of Colorado. (Defs.' Statement of Undisputed Facts and Supp. Exs. ¶1 [filed May 15, 1990] [hereinafter "Defs.' Statement"], *admitted at* Pl. Fed. Election Comm'n's Resp. to Defs.' Statement of Undisputed Facts and Supp. Exs. ¶1 [filed July 6, 1990] [hereinafter "Pl.'s Resp. to Defs.' Statement"].) It is the federally-registered committee for the Republican Party in Colorado and is therefore (as it acknowledges) subject to the Act.

Section 441a(d)(3) of the Act limits the amount which such a committee may expend "in connection with the general election campaign of a candidate for federal office." 2 U.S.C.A. § 441a(d)(3). In 1986, the Committee assigned its yearly right to make expenditures under the Act to the National Republican Senatorial Committee. (Defs.' Statement ¶16, Ex. 4 [Defs.' Resp. to Pl.'s Req. for Admis.], *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶15-16.) The Committee thereafter paid $15,000 for a radio advertisement, entitled "Wirth Facts # 1" [hereinafter "the Advertisement"], the text of which follows:

> Paid for by the Colorado Republican State Central Committee

> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

(Defs.' Statement ¶ 7, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee devised "Wirth Facts # 1" as a response to a series of television advertisements featuring then-Congressman Wirth. These advertisements were sponsored by the Committee for Tim Wirth, Inc. (Pl. Fed. Election Comm'n's Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. and in Opp'n to Defs.' Summ. J. Mot. at 6 [filed July 6, 1990] [hereinafter "Pl.'s Mot."].) The Advertisement ran between April 4 and 13, 1986, four months before the August Democratic primary and seven months before the November general election. (Defs.' Statement ¶¶ 4-6, admitted at Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee is required by section 434(b)(4)(H)(iv) to make quarterly or monthly reports which must contain any section 441a(d)(3) expenditures. *See* 2 U.S.C.A. § 434(a)(4)(A)(i). In the Committee's quarterly report, it listed the $15,000 paid for the Advertisement as an operating expense—not as a section 441a(d)(3) expenditure—and identified it as

"voter information to Colorado voters—advertising." (Defs.' Statement, Ex. 12 at 3 [Defs.' Br. for Fed. Election Comm'n Proceedings].) On June 12, 1986, the Colorado Democratic Party filed an administrative complaint with the Federal Election Commission ("Commission"), alleging, inter alia, that defendants' expenditure for the Advertisement violated the Act. On January 10, 1989, the Commission determined there was probable cause to believe defendants had violated sections 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f) of the Act. When settlement negotiations failed, the Commission instituted this civil action.

The parties filed cross-motions for summary judgment on plaintiff's claim that defendants failed to comply with the Act. Defendants maintain section 441a(d)(3) does not apply to the money paid for the Advertisement because it was not an expenditure "in connection with" the general election of a candidate for federal office. (Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J. at 6-7 [filed May 15, 1990] [hereinafter "Defs.' Mot."].) Defendants also assert a counterclaim alleging that section 441a(d)(3) is unconstitutional. No material facts are in dispute. Because I find that plaintiff has failed to demonstrate the Advertisement was "in connection with" the general election of a candidate for federal office, I grant defendants' motion for summary judgment and deny plaintiff's motion. I therefore need not, and do not, reach defendants' challenge to section 441a(d)(3)'s constitutionality.

ANALYSIS

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted where there is "no genuine issue as to any material fact and

the . . . moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id.*, 477 U.S. at 321, 106 S. Ct. at 2552. Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. A triable issue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson*, 477 U.S. at 250, 106 S. Ct. 2511.

Section 441(d)(3) of the Act is at the center of this dispute. It provides:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure *in connection with the general election campaign of a candidate for Fed-*

eral office in a State who is affiliated with such party which exceeds–

> (A) in the case of a candidate for election to the office of Senator . . ., the greater of—
>
> > (i) 2 cents multiplied by the voting age population of the State . . .; or
> >
> > (ii) $20,000. . . .

2 U.S.C.A. § 441a(d)(3) (emphasis added). Because the Committee assigned the full amount of expenditures permitted by section 441a(d)(3) to the National Republican Senatorial Committee, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39-40, 102 S. Ct. 38, 46, 70 L.Ed.2d 23 (1981) [hereinafter *DSCC*], it no longer had the right to make section 441a(d)(3) expenditures. As a consequence, the Committee's expenditure of $15,000 for the Advertisement, if made "in connection with" the general election campaign, was a violation of the spending limits established by section 441a(d)(3).

Two types of expenditures are regulated under the Act: coordinated and independent. A coordinated expenditure is one made in cooperation with, or with the consent of, a candidate, his agents, or an authorized committee of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S. Ct. 612, 647 n. 53, 46 L.Ed.2d 659 (1976). An independent expenditure is one made without the knowledge or permission of a candidate, his agent, or his campaign committee. *Id. See* 2 U.S.C.A. § 431(17). Coordinated expenditures are considered "contributions" under section 441a(a)(7)(B)(i); as such, they may be more freely limited than independent expenditures.

Buckley, 424 U.S. at 48, 96 S. Ct. at 647-48; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 105 S. Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) [hereinafter *NCPAC*]. In *Buckley*, the Court upheld as constitutional the limitations on contributions to candidates and struck down as unconstitutional limitations on independent expenditures. *NCPAC*, 470 U.S. at 491, 105 S. Ct. at 1465. *See also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260, 107 S. Ct. 616, 630, 93 L.Ed.2d 539 (1986) [hereinafter *MCFL*] ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 194, 196-97, 101 S. Ct. 2712, 2720, 2724-25, 69 L.Ed.2d 567 (1981) (same).

Expenditures by party committees are considered to be coordinated expenditures subject to the monetary limits of section 441a(d). *DSCC*, 454 U.S. at 27 n.1, 102 S. Ct. at 40 n.1.[1] Party committees have been deemed incapable of making independent expenditures in connection with the campaigns of their party's can-

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[1] Defendants point to a passage in *Buckley* which classifies 2 U.S.C.A. § 608(f) (West 1970) (recodified as section 441a[d]) as an "expenditure ceiling," as opposed to a contribution limitation. According to defendants, this reference suggests the Court considered section 441a(d) to regulate independent expenditures. It is unclear how referring to section 441a(d) as an "expenditure" limitation necessarily suggests the section regulates *independent* expenditures. In light of the Court and Commission's other pronouncements, and the fact that this reference is dicta, *see Buckley*, 424 U.S. at 58 n.66-67, 96 S. Ct. at 653 n. 66-67, I do not find this singular reference persuasive.

didates. *DSCC*, 454 U.S. at 27 n. 1, 102 S. Ct. at 40 n. 1. *See also* FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985); FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984).

The Commission has the "primary and substantial responsibility for administering and enforcing the Act," and has "extensive rulemaking and adjudicative powers." *Buckley*, 424 U.S. at 109-10, 96 S. Ct. at 677-78. When interpreting the Act, the Commission's interpretation is presumptively entitled to deference. *DSCC*, 454 U.S. at 38, 102 S. Ct. at 45. The Commission has, by regulation, forbidden independent expenditures by national and state party committees. *See* 11 C.F.R. § 110.7(B)(4) (1981).

Defendants suggest that because no Republican candidate had been nominated, the expenditure was necessarily "independent," not "coordinated." However, for purposes of determining whether an expenditure is coordinated or independent, it is irrelevant whether a candidate has been nominated at the time the expenditure is made. *See* FEC Advisory Opinion 1984-15, 1 Fed.Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984). "[N]othing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." *Id.* Organizations whose major purpose is the nomination or election of a candidate "are, by definition, campaign related," *Buckley*, 424 U.S. at 80, 96 S. Ct. at 663, regardless of whether a specific candidate has been nominated. Based on Supreme Court precedent and the Commission's interpretation of the statute, I find that the Committee's expenditure was coordinated. It was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated.

The Committee's expenditure would nevertheless not be subject to section 441a(d)(3) limitations unless the expenditure was made "in connection with" the general election campaign of a candidate for federal office. No controlling or persuasive authority has interpreted the phrase "in connection with" in the context of section 441a(d)(3). The Court, however, has interpreted the phrase "in connection with" in the context of section 441b, which, like section 441a(d)(3), regulates contributions and expenditures. In *MCFL*, the Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249, 107 S. Ct. at 623. *See also Buckley*, 424 U.S. at 80, 96 S. Ct. at 663. "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S. Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Sorenson v. Secretary of Treasury of the United States*, 475 U.S. 851, 860, 106 S. Ct. 1600, 1606, 89 L.Ed.2d 855 (1986); *Barnson v. United States*, 816 F.2d 549 (10th Cir.), *cert. denied*, 484 U.S. 896, 108 S. Ct. 229, 98 L.Ed.2d 188 (1987) (when the same words are used in different sections of the same law, they will be given the same meaning).

This rule of statutory construction is usually followed where different parts of the same act have a similar purpose, as do sections 441a(d)(3) and 441b. Both sec-

tions 441a(d)(3) and 441b are intended to regulate contributions and expenditures of multi-person organizations. While section 441a(d) regulates expenditures by national committees, state committees, or subordinate committees of the state committees, section 441b regulates expenditures by national banks, corporations, or labor organizations. Since I examine the statute as a whole, I find the Court's interpretation of "in connection with" in the context of section 441b to be persuasive of my interpretation of the same words in section 441a(d)(3).

Plaintiff urges the court to adopt the Commission's interpretation of "in connection with" which would require the Advertisement to contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin.Guide (CCH) ¶5819 (July 18, 1985). According to plaintiff, section 441b differs significantly from section 441a(d)(3), in that 441b regulates independent expenditures, whereas section 441a(d)(3) regulates coordinated expenditures. Although *Buckley* acknowledges that coordinated expenditures may be more freely regulated than independent expenditures, it does not follow that the identical words, when used with reference to coordinated expenditures, should be given a more expansive interpretation.

The Supreme Court's decision in *Buckley* suggests just the opposite. When examining the intrusiveness of the statute's regulations on first amendment freedoms, the Court found that a limitation on coordinated expenditures was justified in order to stem "the reality or appearance of corruption in the electoral process." *Buckley*, 424 U.S. at 46, 96 S. Ct. at 647-48. Although

the Court found the justification for regulating coordinated expenditures outweighed the infringement on the First Amendment, this conclusion does not create a carte blanche for expansive regulation of coordinated expenditures. On the contrary, the fact that section 441a(d)(3) implicates first amendment freedoms argues for adoption of the more narrowly defined "express advocacy" interpretation in order to minimize intrusions.[2] Moreover, as *Buckley* notes, the limitation on contributions by state political committees, "[r]ather than undermining freedom of association, . . . enhances the opportunity of bona fide groups to participate in the election process." *Buckley*, 424 U.S. at 33, 96 S. Ct. at 642. Given that the effect of the regulation is to enhance the political freedom of committees, I find that the "express advocacy" standard, which is a less intrusive limitation on a committee's freedom, is consistent with the Act's purpose. I do not find any compelling justification within the Commission's advisory opinion, nor in plaintiff's argument, for expanding *Buckley*'s carefully circumscribed exception to its prohibition against regulation of freedom of speech.

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[2] A narrow interpretation of the words "in connection with" also addresses the constitutional concerns raised by defendants. Defendants contend that if all expenditures by state committees were deemed contributions subject to section 441a(d)(3), then they would not be free to speak in favor of their candidates. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Reply to Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 4 [filed July 25, 1990] [hereinafter "Defs.' Reply"].) By adopting a more narrowly defined interpretation of "in connection with," state political committees remain free to engage in speech which does not expressly advocate the election of its candidates.

The Commission does not point to any other section of the statute where the courts have given the language "in connection with" the expansive interpretation the Commission advocates in this case. In fact, the courts have consistently interpreted "in connection with" as requiring "express advocacy." *See Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S. Ct. 151, 98 L.Ed.2d 106 (1987); *Federal Election Comm'n v. Central Long Island Tax Reform*, 616 F.2d 45, 53 (2nd Cir. 1980).[3] In *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), the Commission itself advocated the adoption of the "express advocacy" interpretation of "in connection with" in the context of section 441b(a). In adopting the Commission's interpretation, the D.C. Circuit noted:

> [T]he FEC's interpretation is consistent with *Buckley*, in which the Supreme Court held that under the first amendment, the phrases "for the

[3] In *United States v. International Union UAW-CIO*, 352 U.S. 567, 587, 77 S. Ct. 529, 550, 1 L.Ed.2d 563 (1957), the Court interpreted "in connection with" in the context of a predecessor to the current Act, which prohibited corporate or union contributions or expenditures to be used "in connection with" any election for federal office. *Id.*, 352 U.S. at 568, 77 S. Ct. at 530. The Court held that the "in connection with" found in the statute was understood to proscribe "the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party." *Id.*, 352 U.S. at 587, 77 S. Ct. at 550. It is unclear from this language whether the Court was adopting a different interpretation of "in connection with" or merely applying the "express advocacy" standard. Plaintiff does not explain how this language differs materially from the "express advocacy" standard. Since no court has subsequently adopted the language used in *International Union UAW-CIO*, I decline to do so in this case.

> purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable candidate," a definition that was subsequently incorporated into the Act. *See* 2 U.S.C. § 431(17). To be sure, the Court limited these definitions to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions, *see Buckley*, 424 U.S. at 78-80, 96 S. Ct. at 663-64. Nonetheless the fact that the Court in *Buckley* formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical, reasonable, and consistent with the overall statutory framework. *The fact that the FEC adopted this interpretation for all relevant statutory provisions, even where not constitutionally required, only adds to its reasonableness for it enhances the consistency and evenhandedness with which the FEC ultimately administers the Act.*

Orloski, 795 F.2d at 166-67 (emphasis added). *See also* FEC Advisory Opinion 1978-46, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5348 (Oct. 5, 1978) (suggesting that section 441a(d) requires "express advocacy").

The "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *DSCC*, 454 U.S. at 35, 102 S. Ct. at 44; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5, 98 S. Ct. 566, 573 n.5, 54 L.Ed.2d 538 (1978). I do not find the Commission's suggested interpretation of "in connection with" to be entitled to deference where it is

neither thorough nor consistent with either its own previous rulings or the courts' holdings. I conclude that "express advocacy" is required in order for a coordinated expenditure to be "in connection with" the general election campaign of a candida e for federal office under section 441a(d)(3).

Having made this determination, I must decide whether the Advertisement constituted "express advocacy." The Court has adopted a bright-line test for identifying speech which constitutes "express advocacy," recognizing that:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42, 96 S. Ct. at 645. *See Furgatch*, 807 F.2d at 860; *Federal Election Comm'n v. National Organization for Women*, 713 F. Supp. 428, 432 (D.D.C. 1989). The Court defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.'" *Buckley*, 424 U.S. at 46 n.52, 96 S. Ct. at 647 n.52. Speech is "advocacy" if it "presents a clear plea for specific action, and . . . it must be clear what action is advocated." *Furgatch*, 807 F.2d at 864. Speech which is merely informative would not be considered "advocacy." *Id.* When determining whether speech constitutes "express advocacy," the focus is on the actual wording used. *Buckley*, 424 U.S. at 42, 96 S. Ct. at 646.

The Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action. The Advertisement concludes with "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the Advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch*.

According to plaintiff, the surrounding circumstances suggest the Advertisement was, in fact, a plea for action. The Advertisement identified Wirth by name and position, referred to his senate candidacy, responded to Wirth's own campaign advertisements, and said "paid for by the Colorado Republican State Central Committee." (Pl.'s Mot. at 15.) At the time the Advertisement ran, plaintiff maintains, Wirth was the only credible announced Democratic candidate for Senate. *Id.* In addition, the public "knew" the sponsor of the Advertisement, *i.e.*, the Republican party, would eventually nominate a candidate. Thus, the Advertisement implicitly urged the public both to vote against Wirth and to support whomever the Republican candidate would be. Plaintiff also points to contemporaneous press statements of Howard "Bo" Callaway, then Chairman of the Colorado Republican Party, concerning the state committee's general purpose which allegedly leave "no doubt that the intent of the ad was to attack Mr. Wirth's candidacy for the Senate." (Pl.'s Mot. at 10-11, 17-18.)

I do not believe this type of indirect urging constitutes "express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation. *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471 (1st Cir. 1991). In adopting a bright-line approach, the Court noted the difficulty in interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43, 96 S. Ct. at 646 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S. Ct. 315, 325, 89 L.Ed. 430 [1945]). In adopting the "express advocacy" standard, the Court sought to protect issue advocacy. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential. . . . Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14-15, 96 S. Ct. at 632. Trying to determine whether the surrounding circumstances, coupled with the implications of the Advertisement, constitute "express advocacy" leads to the type of semantic dilemma which the Court sought to avoid by adopting a bright-line rule. I decline to blur *Buckley*'s bright-line rule by interpreting the Advertisement's criticism of Wirth as "express advocacy." Viewing the facts in the light most favorable to plaintiff, I find that the Advertisement does not call for the type of "express advocacy" required by *Buckley*. Because I conclude that no reasonable trier of fact could find for plaintiff on the basis of the evidence presented, defendants are entitled to summary judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

With regard to plaintiff's motion for summary judgment, the analysis of whether the Advertisement constitutes "express advocacy" is the same. Defendants allege that the Advertisement neither contains a direct plea for action, nor conveys support for a particular candidate. According to defendants, the Advertisement simply informed the public about the political record of an incumbent Colorado congressman; it did not advocate voting for or against any political candidate. (Defs.' Mot. at 7.) In addition, the Advertisement was broadcast seven months before the general election—before either party had chosen its candidate. (Defs.' Reply at 10.) Defendants claim Wirth's senate candidacy was referenced in the Advertisement only for the purpose of identifying his statements. (Defs.'

Reply at 9.) Plaintiff fails to adequately rebut these claims. Accordingly, plaintiff's motion for summary judgment is denied.

Conclusion

Because I find that the expenditure for the Advertisement was not "in connection with" the general election of a candidate for federal office, it was not subject to section 441a(d)(3) limitations and did not violate the Act. Since I am able to resolve the dispute on statutory grounds, I do not reach defendants' challenge to the constitutionality of section 441a(d)(3). Defendants cannot avoid this result by posturing the constitutional issue as an independent counterclaim. It is therefore

ORDERED as follows:

(1) Plaintiff's motion for summary judgment is DENIED; and

(2) Defendants' motion for summary judgment is GRANTED. All claims against defendants are dismissed. Defendants' counterclaim is DISMISSED as moot.

Supreme Court, U.S.
FILED
SEP 6 2000
CLERK

(3)

No. 00-191

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Petition For a Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the pennies per voter limit that 2 U.S.C. § 441a(d) imposes upon a political party's expenditure of so-called "hard money"—money raised in limited amounts from restricted sources and publicly reported—for party speech that is coordinated with the party's federal candidate violates the First Amendment to the United States Constitution.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Respondent/appellee/cross-plaintiff Colorado Republican Federal Campaign Committee ("Colorado Party") joins the Federal Election Commission ("FEC") in urging this honorable Court to grant the Petition for a Writ of Certiorari, but for somewhat different reasons than those advanced by the Petition. The Colorado Party disagrees with the Petition's reasoning, its description of what the court of appeals held, and the issue presented for review.

I. The Petition For A Writ Of Certiorari Should Be Granted

Twenty-four years ago, this Court expressly reserved the question of the First Amendment constitutionality of the Party Expenditure Provision, 2 U.S.C. § 441a(d), in *Buckley v. Valeo*, 424 U.S. 1, 59 n.67 (1976). In 1996, when the Court first considered this case, it gave a partial answer, holding that the Party Expenditure Provision cannot constitutionally limit a political party's spending on speech that is independent of its candidate. The Court remanded for further development, however, the constitutionality of the Provision's limits on a party's "hard money" expenditures for speech that the party coordinates with its own candidates. Following additional discovery, extensive evidentiary submissions, and focused briefing, the district court and the court of appeals each wrote detailed opinions holding that the Provision is unconstitutional. Thus, the 24-year old question now is ripe for this Court's review.

A definitive ruling is needed. All political parties nationwide are subject to the Party Expenditure Provision, which limits their political communications. In papers filed with the court of appeals and the district court seeking a stay,[1] the FEC has reiterated that it will not accept the court of appeals' holding outside the Tenth Circuit. Indeed, the FEC intends to enforce the Provision retroactively within the Tenth Circuit if the ruling ever is reversed. FEC Statement (June 22, 2000) *at* http://www.fec.gov/pages/FECstatemtjune2000.htm. Thus, this Court's denial of review would present "a substantial risk

[1] On July 11, the court of appeals denied the FEC's Motion to Stay Mandate. The district court has yet to rule on the FEC's Motion for a Partial Stay Pending Appeal filed on June 23, 2000.

that application of the provision will lead to the suppression of speech." *NEA v. Finley*, 524 U.S. 569, 580 (1998).

II. The Question Presented Is Narrower Than Described in the Petition

A. This Case Concerns Hard Money, Not Soft Money

The issue presented for review is critically narrower than that suggested by the Petition for Certiorari. The Petition's Question Presented implies that the lower courts broadly and affirmatively established that parties can spend unlimited amounts from any sources in support of their candidates.

What the lower courts did was to strike down a particularly stringent limitation on the use of so-called "hard money"—that is, money raised in limited amounts from restricted sources and fully disclosed according to law. *E.g.*, App. 1a-18a (reported at 213 F.3d 1221); App. 1a-60a-61a (reported at 41 F. Supp. 2d 1197). As the district court found, most "hard money received by the parties is in the form of small (i.e., less than $100) contributions from individual contributors." App. 1a-64a.

The lower courts pointedly did not hold that political parties have a right to receive and spend so-called "soft money" that is raised in unlimited amounts from unrestricted sources. The court of appeals stressed that "we address only the constitutionality of § 441a(d)(3)'s limit on hard money coordinated expenditures." App. 1a-19a. The district court concurred: "While soft money may be received in unlimited amounts and from a multitude of sources, there is no suggestion in the evidence that such money is also used for coordinated expenditures." App. 1a-86a.

Whether and how soft money receipts and expenditures should be regulated is not at issue here. As the court of appeals stated, "We appreciate the FEC's concern over soft

money, but this proceeding does not present the opportunity for soft money reform." App. 1a-18a-19a. Likewise, the district court made clear that "[t]his case is not about the entirety of the campaign finance system." App. 1a -86a. This Court made a similar observation when it last addressed this case, noting that "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign" and thus, "the opportunity for corruption posed by these greater opportunities for contributions [to parties] is, at best attenuated." App. 1a-102a (*Colorado I*, 518 U.S. at 616).[2]

B. This Case Concerns Burdens On The Unique Relationship Between Political Parties And Their Candidates

Contrary to the suggestion of the Petition (at 17-18), the lower courts did not hold that political parties have a First Amendment right to engage in more speech than others. Instead, the lower courts recognized that political parties have a special interdependent relationship with their own candidates (who themselves have no spending limits, *Buckley*, 424 U.S. at 51-54), sharing a common purpose and committed to mutual expression and association. *E.g.*, App. 1a-20a-21a; App. 1a-80a-83a, 87a-88a. As Justice Kennedy (joined by Chief Justice Rehnquist and Justice Scalia) explained in this case:

---

[2] According to the FEC's own June 23, 2000 press release (at http://www.fec.gov/press/ptymy99a.htm), the national Republican and Democratic Parties have raised $179.3 million and $104 million respectively in hard money for the first 15 months of fundraising (January 1999 through March 2000), which is a decrease of $2.1 million for the Republicans and an increase of $.8 million for the Democrats when compared to the funds raised during the same period in 1995-96. By contrast, the Republicans raised $86.4 million, a 93% increase, and the Democrats raised $80.2 million, a 102% increase, in soft money. *Id.*

> A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; *but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa.*

App. 1a-117a (518 U.S. at 629) (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added). More recently, the Court stated, "Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'" *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2408 (2000).

Thus, it is a uniquely severe burden to require political parties to separate themselves from their candidates as a condition of engaging in political speech during an election. The lower courts held that, particularly in light of the multiple legal restrictions imposed on parties with respect to raising and reporting hard money contributions, the severe burden on a party's political speech imposed by the Party Expenditure Provision was not justified.

C. This Case Concerns A Limit On Political Speech, Not A Restriction On Monetary Contributions To A Candidate

The Petition for Certiorari (at 14) mistakenly suggests that the lower courts held that political parties are free to engage in spending that is "functionally and constitutionally indistinguishable from direct contributions to candidates." Contradicting its later claim, the Petition concedes (at 4), that the Party Expenditure Provision does not regulate a party's "transfer of funds to the candidate herself." In fact, the Provision limits party communications not mere money transfers.

The undisputed record shows that political parties have their own messages to disseminate and that 90% of the spending that is curtailed by the Provision historically has been devoted to advertising and mail, i.e. pure speech. *See* App. 1a-83a ("Thus, unlike contributions, communications via coordinated party expenditures implicate core First Amendment rights."). For example, a political party might wish to send each registered voter of the state a letter introducing the party's candidate and explaining how electing that candidate will advance the party's objectives. Under the pennies per voter limit imposed by the Party Expenditure Provision, the Colorado Party could not send such a letter if coordinated with its candidate.[3]

The Petition (at 14) inaccurately portrays a political party as a "simple expedient" for candidate bill paying. Based on the extensive record, the lower courts rejected that view, declining to reduce parties to the political equivalent of a potted plant that contributors and candidates use or ignore as seems expedient. The unique role of the modern political party in our democracy was conceded by all of the experts, including the FEC's, who testified in this case. Accordingly, the lower courts found that political parties play a vital and legitimate role in our political process and in political debate. *E.g.*, App. 1a-13a ("From the birth of this republic into the 21st century, political parties have provided the principal forum for political speech and the principal means of political association.").

---

[3] In a March 1 press release, *FEC Announces 2000 Party Spending Limits* (at http://www.fec.gov/press/441ad2000.htm), the FEC announced the coordinated expenditure limits to be less than seven cents per potential voter. The spending limit formula is two cents multiplied by the state's voting age population, adjusted for inflation.

D. The Party Expenditure Provision Was Enacted To Reduce Campaign Spending; Not To Prevent Corruption

The Petition contends (at 18) that Congress judged hard money spending by political parties to be a source of corruption. This assertion is unfounded. Nothing in the legislative history of the Party Expenditure Provision reflects any such congressional concern. Instead, as this Court already noted, "Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." App. 1a-104a (518 U.S. at 618); *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981) (Party Expenditure Provision was intended to "assur[e] that political parties will continue to have an important role in federal elections.").

Indeed, the Colorado Party's brief on the merits—should review be granted—will argue that modern political parties are an important mechanism for openness and accountability. By limiting the ability of parties to use hard money to fund coordinated speech, the Party Expenditure Provision perversely drives parties toward less desirable, less regulated soft money activities. At the same time, the Provision reduces the vitality of political competition by muffling a voice that is unique in its support for challengers and non-incumbent candidates. *See* App. 1a-66a. Striking the Provision and allowing parties discretion to spend disclosed and limited hard money will reduce the role of "large" soft money contributors and alleviate the "corruption" concerns voiced by the FEC. Far from undermining federal campaign regulation, as the Petition claims (at 14), striking the Provision will strengthen the campaign system.

E. The Issue Here Is Very Different From That Presented By *Nixon v. Shrink Missouri Government.*

The Petition repeatedly cites *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), as if it concerned the issue presented here. In fact, as the court of appeals recognized, that case concerned the type of general contribution limit that was sustained long ago in *Buckley*. App. 1a-15a & n. 9.

The contribution limit sustained in *Shrink Missouri Government* did not impose a burden on the unique relationship between a political party and its candidate comparable to that imposed by the Provision. Nor was the limit shown to uniquely burden a political party's own political speech, as occurs under the Provision. And the Missouri limit was enacted for the precise purpose of preventing corruption, not for the purpose of reducing the level of spending that led to the Party Expenditure Provision.

Buckley, 424 U.S. at 59 n.67, and *Colorado I*, App. 1a-101a-102a, 109a-112a (518 U.S. at 616-17, 622-25) recognized that a party spending limit affects parties in unique ways which First Amendment analysis must take into account. *Shrink Missouri Government* did not call for and did not involve such analysis.

CONCLUSION

In sum, this case presents an important issue that is ripe for review and that this Court first reserved 24 years ago. The question presented is whether the Party Expenditure Provision, which limits coordinated spending of hard money by political parties to just pennies per voter, violates the First Amendment. For the reasons discussed above, the lower courts correctly concluded that the Provision is invalid. This Court should review and affirm those rulings on a nationwide

basis. The Colorado Party urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-191

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 00-191

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

A. Respondent explains (Resp. 3) that the federal election laws distinguish between so-called "soft money," which "is raised in unlimited amounts from unrestricted sources," and "hard money," which is "raised in limited amounts from restricted sources and fully disclosed according to law." Respondent further explains (*ibid.*) that the instant case involves only the permissible uses of "hard money."

The petition for certiorari acknowledges (at 23) that "[b]ecause 'soft money' cannot lawfully be spent to influence federal elections, the party cannot (even under the court of appeals' decision) use those donations to make coordinated expenditures on behalf of candidates for federal office." We thus do not contend

that "the lower courts broadly and affirmatively established that parties can spend unlimited amounts from any sources in support of their candidates." Resp. 3. And we agree that "[w]hether and how soft money receipts and expenditures should be regulated is not at issue here." *Ibid.*

As we explain in the petition, however, the absence of any federal limit on "soft money" donations increases the corruptive potential of party coordinated expenditures, even though the coordinated expenditures themselves are made with "hard money." See Pet. 23-24. A party committee may direct its coordinated expenditures to candidates favored by a substantial "soft money" donor, and may use those coordinated expenditures to induce the candidate (once elected or re-elected) to look favorably upon that donor's interests. *Ibid.* The existence of that danger is surely relevant to the question whether 2 U.S.C. 441a(d) serves the government's interest in preventing the fact or appearance of political corruption.[1]

---

[1] Indeed, respondent contends that "[b]y limiting the ability of parties to use hard money to fund coordinated speech, [2 U.S.C. 441a(d)] perversely drives parties toward less desirable, less regulated soft money activities." Resp. 7. Respondent argues that "[s]triking [section 441a(d)] and allowing parties discretion to spend disclosed and limited hard money will reduce the role of 'large' soft money contributors and alleviate the 'corruption' concerns voiced by the FEC." *Ibid.* The government does not agree with respondent's predictions regarding the likely effect of the court of appeals' decision. At a more general level, however, respondent and the government are in accord that the absence of any federal cap on the permissible amount of "soft money" donations is likely to affect the manner in which party coordinated expenditures are used. The reality of unlimited "soft money" donations is therefore relevant in assessing the practical effects, and the constitutional status, of the "hard money" expenditures that are at issue in this case.

B. Respondent's reliance (see Resp. 5) on *California Democratic Party* v. *Jones*, 120 S. Ct. 2402 (2000), is misplaced. *Jones* involved a State's effort to regulate the internal processes of a political party in a sphere—the selection of a nominee for public office—in which the party's interest in freedom of association is at its height. See *id.* at 2408 ("In no area is the political association's right to exclude more important than in the process of selecting its nominee."). Section 441a(d), by contrast, does not intrude upon respondent's internal processes or limit its freedom to select the candidates and/or positions that it wishes to support. It simply limits the manner in which respondent may use *money* to achieve its objectives. Nothing in *Jones* suggests that a political party is constitutionally entitled to a categorical exemption from the coordinated expenditure limits that apply to individuals and to other political committees.[2]

C. As the petition explains (at 13-15), the effect of the court of appeals' decision is to allow political parties within the Tenth Circuit to make all forms of coordinated expenditures in support of their federal candidates, including coordinated expenditures (such as the

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[2] Respondent contends (Resp. 5) that Section 441a(d) "require[s] political parties to separate themselves from their candidates as a condition of engaging in political speech during an election." The choice is hardly as stark as respondent suggests, however, since Section 441a(d) allows political parties to make coordinated expenditures in amounts far in excess of the limits that apply to other potential supporters of the candidate. See Pet. 5-6, 17-18. And respondent is, of course, permitted to make unlimited independent expenditures in support of the party's candidates.

direct payment of the candidate's bills) that are the functional and constitutional equivalent of direct monetary contributions.[3] Respondent correctly observes (Resp. 6) that Section 441a(d) *also* limits the party's ability to spend money, in coordination with the candidate, on the dissemination of communicative materials to voters.[4] Respondent does not, however, make any effort to refute our contention that the court of appeals' decision gives political parties a First Amendment right to pay their candidates' bills.[5] Nor does

[3] The petition explains that some coordinated expenditures—and, in particular, a supporter's direct payment of the favored candidate's bills—are "functionally and constitutionally indistinguishable from direct contributions" (Pet. 14) even though they "do not involve a transfer of funds to the candidate herself" (Pet. 4). Contrary to respondent's contention (Resp. 5), those statements are in no way inconsistent. Indeed, when this case was previously before the Court, the plurality observed that "many [coordinated] expenditures are * * * virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)." Pet. App. 111a (518 U.S. at 624) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976)). For that reason, the plurality explained, "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits." Pet. App. 112a (518 U.S. at 625).

[4] That a particular party expenditure finances the dissemination of written materials to voters does not necessarily mean that the party's own expressive rights are implicated. If the party disseminates materials whose content is wholly dictated by the candidate, payments made in connection with that effort are not meaningfully different from direct contributions.

[5] Respondent asserts that "[t]he undisputed record shows that political parties have their own messages to disseminate and that 90% of the spending that is curtailed by [Section 441a(d)] historically has been devoted to advertising and mail, i.e., pure speech." Resp. 6. Respondent does not identify, and we are unaware of, any

respondent suggest any basis on which such payments might be distinguished, for constitutional purposes, from direct contributions of money.

D. Contrary to respondent's assertion (Resp. 7), the pertinent legislative history reflects congressional concern about the potential corruptive effects of campaign spending by political parties—and, in particular, the danger that large party contributions could be used as a means of evading statutory limits on individual donations. That concern was expressed during Senate debate in 1973 on a predecessor bill to the one finally enacted in 1974. Senator Mathias explained:

> We have controlled the line which runs from the individual to the candidate to a $3,000 limit. We have controlled or limited the flow from a political committee to a candidate to $5,000. We have limited or controlled the line which flows from an individual to a political party to $100,000.
>
> But what this amendment really goes to is one of the areas which is not controlled, and that is from the party to the candidate. That, of course, is a wide open avenue. An [individual] who could contribute $100,000 to a party could well envision that that money, by some arrangement, would be directed to a candidate. Such arrangements are not unknown. They may be informal, but earmarking would be possible. This amendment would prevent that kind of indirect contribution of $100,000 to a single

record material(s) that would support the 90% figure. Respondent also states that "[t]he Petition (at 14) inaccurately portrays a political party as a 'simple expedient' for candidate bill paying." Resp. 6. Even a cursory examination of page 14 makes clear that the petition says no such thing.

> candidate by a single contributor. I think it is a loophole which needs to be looked at very carefully.

119 Cong. Rec. 26,321 (1973).[6] Senators Kennedy and Pastore observed, based on their prior experience as legislators, that through unspoken understandings donors could achieve the result that Senator Mathias described—*i.e.*, using the party as a conduit for large contributions to candidates without any explicit earmarking of funds. See *id.* at 26,323, 26,323-26,324. Although the provisions ultimately enacted in 1974 differed in some respects from those debated during the previous year, the 1973 debate casts significant light on the interests that Section 441a(d) was intended to serve.

E. As respondent points out (Resp. 8), this Court's decision in *Nixon* v. *Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), did not involve limits on the campaign spending of political parties. But while *Shrink Missouri* does not control this case, its reasoning bears directly on the question presented here. *Shrink Missouri* reaffirms the legislature's power to enact reasonable contribution limits in order to address the "improper influence" and "opportunities for abuse" that may result when an elected official becomes unduly

[6] The amendment to which Senator Mathias referred was offered by Senator Stevenson (see 119 Cong. Rec. at 26,320) and would have had the effect of subjecting party committees to the same spending limits as other political committees. See *id.* at 26,321 (Senator Stevenson states that the amendment would "have the effect of equalizing the amount to party political committees and all other political committees"). The bill ultimately enacted in 1974 permits political parties to make substantially larger coordinated expenditures in support of federal candidates than other political committees are allowed to make. See 2 U.S.C. 441a(d); Pet. 5-6, 17-18.

dependent on financial support from a single source. See *id.* at 905 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 28 (1976)); Pet. 24-25. If (as we contend) Congress may reasonably determine that the same concerns are implicated by large party coordinated expenditures, then *Shrink Missouri* substantially supports the constitutionality of Section 441a(d).

F. Respondent agrees (Resp. 2-3) that the petition for a writ of certiorari should be granted. As respondent explains, "[a] definitive ruling is needed" (Resp. 2): the court of appeals' decision creates significant uncertainty regarding the spending practices in which political parties may engage, and it impedes the uniorm application of the federal campaign finance laws.[7] For those reasons, and because the court of appeals has held a provision of an Act of Congress to be unconstitutional, review by this Court is warranted.

[7] In *Missouri Republican Party* v. *Lamb*, No. 00-1773 (8th Cir. Sept. 11, 2000), a divided panel of the Eighth Circuit recently held that a state-law limitation on cash and in-kind contributions by political parties to candidates violates the party's First Amendment rights. The court rejected Missouri's contention that the contribution limit serves to prevent actual or apparent political corruption, stating that "it is not easy to see how a party could 'corrupt' one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles." Slip op. 5. The court relied in part on the Tenth Circuit's decision in the instant case. See *id.* at 5, 6. The dissenting judge would have upheld the law on the ground that "contributions made by a political party are no different than contributions made by individuals or other groups." *Id.* at 13 (John R. Gibson, J., concurring and dissenting). He concluded that "[b]ecause Missouri's limits on cash contributions that a party may make to a candidate are closely drawn to meet a sufficiently important governmental interest, they do not violate the First Amendment." *Ibid.*

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2000

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v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: AUGUST 3, 2000
CERTIORARI GRANTED: OCTOBER 10, 2000

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket No. 99-1211

FEDERAL ELECTION COMMISSION, PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DEFENDANT-COUNTER-PLAINTIFF-APPELLEE

Filed: Apr. 27, 1999

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
4/27/99	–	[1226881] Civil case docketed.
		* * * * *
6/23/99	–	[1243323] Appellant's brief by Federal Election. Original and 7 copies. c/s:y. Served on 6/14/99. Oral argument? y, Appendix filed. Original and 1

DATE	DOCKET NUMBER	PROCEEDINGS
		appendix copy. Appendix Pages: 667 (Two Volumes-One SEALED envelope).
		* * * * *
7/29/99	–	[1252545] Appellee's brief filed by Colorado Republican. Original and 7 copies. c/s: y. Served on 7/28/99 Oral Argument? y (hrs)
8/23/99	–	[1259204] Appellant's reply brief filed by Federal Election. Original and 7 copies. c/s: y (afw)
1/18/00	–	[1294652] Case argued and submitted to Judges Seymour, Tacha, Kelly. (ss)
		* * * * *
1/21/00	–	[1295838] Appellee's supplemental authority filed by Colorado Republican and submitted to court. Original and 3 copies. c/s: y. (kf)

DATE	DOCKET NUMBER	PROCEEDINGS
2/7/00	–	[1299735] Appellant's supplemental authority filed by Federal Election and submitted to court. Original and 7 copies. c/s: y. (nak)
2/22/00	–	[1303447] Appellee's supplemental authority filed by Colorado Republican and submitted to court. Original and 3 copies. c/s: y. (kf)
5/5/00	–	[1322392] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Seymour, dissenting; Tacha, authoring judge; Kelly. [99-1211] (nak)
6/23/00	–	[1335038] Appellant's motion filed by Appellant Federal Election to stay execution of the mandate pending filing of writ of certiorari. [99-1211] Original and 3 copies. c/s: y (afw)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/11/00	–	[1338825] Order filed by Judges Seymour, Tacha and Kelly denying Appellant's motion to stay execution of the mandate pending filing of cert. [1335038-1] Parties served by mail. (afw)
7/11/00	–	[1338851] Mandate issued to district court. Mandate receipt due 8/1/00. (afw)

* * * * *

8/11/00	–	[1347008] Petition for writ of certiorari filed on 8/8/00 by Appellant Federal Election. Supreme Court Number 00-191. (kf)
10/13/00	–	[1363027] Supreme Court order dated 10/10/00 granting certiorari filed. (gah)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Docket No. 89-N-

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS L. JONES, DEFENDANTS

Filed: XXXXXX

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
7/6/89	–	COMPLAINT . . pd
8/25/89	–	ANSWER & COUNTERCLAIM . . by Defts . . . cos
5/15/90	–	Motion by defendant Colorado Republican, defendant Douglas Jones for summary judgment before Judge Edward W. Nottingham (yk) [Entry date 08/31/90]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/6/90	9	Motion by plaintiff Federal Election Com for summary judgment before Judge Edward W. Nottingham (yk) [Entry date 07/09/90]
		* * * * *
8/30/93	19	ORDER and Memorandum of decision: by Judge Edward W. Nottingham denying motion for summary judgment before Judge Edward W. Nottingham [9-1] granting; motion for summary judgment before Judge Edward W. Nottingham [0-1] dismissing case; defs' counterclaim dismissed as moot (cc: all counsel); entry date: 8/30/93 (yk)
8/31/93	20	JUDGMENT: by Clerk James R. Manspeaker re [19-2] jgm entered for defs against plf dismissing case, parties to pay own costs (cc: all counsel); entry date: 8/31/93 (yk)

DATE	DOCKET NUMBER	PROCEEDINGS
10/27/93	21	NOTICE OF APPEAL by defendants in re memorandum opinion and order [19-2] of 8/30/93; Notice of transcript order form due 11/8/93; Notice mailed to all counsel on 10/27/93 (gc) [Edit date 08/06/96]
		* * * * *
10/28/93	22	NOTICE OF APPEAL by plaintiff Federal Election Com in re order and memorandum of decision [19-2] of 8/30/93; Notice of transcript order form due 11/8/93; Notice mailed to all counsel on 10/28/93 Fee Status: USA (dh) [Edit date 08/06/96]
11/2/93	23	Case No. 93-1433 assigned by the Court of Appeals. [21-1] (gc) [Entry date 11/03/93]
11/2/93	24	Case No. 93-1434 assigned by the Court of Appeals. [22-1] (gc) [Entry date 11/03/93]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/15/95	28	MANDATE from the Court of Appeals; CA # 93-1433 and 93-1434; Dt issued 9/14/95; JUDGMENT dated 6/23/95 reversing the decision of the District Court and remanding w/ instructions that the Disctrict Court enter judgment in favor of FEC and for a determination under 2 USC 437g(a)(6) of the appropriate civil penalty. re: [Appeal [22-1], [Appeal 21-1]; Mandated order deadline set for 11/14/95 (gc) [Entry date 09/18/95]
		* * * * *
10/6/95	32	NOTIFICATION from Court of Appeals regarding Petition for Writ of Certiorari Filed in US Supreme Court on 9/21/95 Case No 95-489 (re appeal [22-1], (re appeal [21-1] (gc)
1/25/96	33	LETTER (Re: [22-1], [21-1]) from USCA advising that Supreme Court has granted the petition for writ of cert. (gc) [Entry date 01/26/96]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
8/5/96	39	RECALL of mandate from Court of Appeals CA #93-1433 & 93-1434; Date issd 8/2/96. Pursuant to judgment of the Supreme Court . . . mandate issued 9/14/95 is recalled. Jgm of 6/23/95 is vacated re: appeal [22-1], appeal [21-1] (gc) [Entry date 8/06/96]
		* * * * *
11/14/96	44	MANDATE from the Court of Appeals; CA # 93-1433 & 93-1434; Dt issued 11/12/96; JUDGMENT dated 9/20/96 remanding the decision of the District Court [Appeal [22-1], appeal [21-1] (gc) [Entry date 11/15/96]
		* * * * *
11/27/96	46	First Amended COUNTERCLAIM by dfts CO Repblcn Fed Cmpgn, Douglas Jones against plaintiff Federal Election Com (tp) [Entry date 12/03/96]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/3/97	58	REPLY TO 1st Amended Compulsory COUNTERCLAIM [46-1] by counter-defendant Federal Election Com (tp) [Entry date 03/05/97]
		* * * * *
4/14/97	60	MINUTE ORDER: by Judge Edward W. Nottingham; Prelim Pretrial Conf (status conf) set 5/23/97 vacated and reset for 8:15 5/22/97 in Room C-201 (cc: all counsel); entry date: 4/16/97 (tp) [Entry date 04/16/97]
4/21/97	61	Memo BRIEF by Federal Election Com in opposition to motion for protective order re disclosure of certain political, personal & other information [59-1] (tp) [Entry date 04/22/97]
4/21/97	62	OBJECTIONS by Republican Party of State of LA to subpoena to produce & permit inspection of documents (tp) [Entry date 04/22/97]

DATE	DOCKET NUMBER	PROCEEDINGS
4/22/97	63	MOTION by cntdft Federal Election Com to extend time for discovery to 2/28/98 (tp) [Entry date 04/24/97]
4/22/97	64	Certificate of Compliance by cntdft Federal Election Com re motion to extend time for discovery to 2/28/98 [63-1] (tp) [Entry date 04/24/97]
4/30/97	65	REPLY by cntdft CO Rpblcn Fed Cmpgn to opposition to motion for protective order re disclosure of certain political, personal & other information [59-1] (tp) [Entry date 05/05/97]
4/30/97	66	BRIEF by counter-claimant CO Rpblcn Fed Cmpgn in opposition to motion to extend time for discovery to 2/28/98 [63-1] (tp) [Entry date 05/05/97]
5/1/97	67	Stipulation and ORDER by Judge Edward W. Nottingham re extension of time to depose John Heubusch & Maria Cino to 5/8/97 (cc: all counsel); entry date: 5/5/97 (tp) [Entry date 05/05/97]

DATE	DOCKET NUMBER	PROCEEDINGS
5/2/97	68	MOTION by cntdft Federal Election Com to extend time for fact discovery for purpose of deposing Haley Barbour (tp) [Entry date 05/05/97]
5/2/97	69	Certificate of Compliance by counter-defendant Federal Election Com re motion to extend time for fact discovery for purpose of deposing Haley Barbour [68-1] (tp) [Entry date 05/05/97]
5/5/97	70	MOTION by non-parties Republican Natl Committee, Natl Republican Congressional Committee, Natl Republican Senatorial Committee, Maria Cino & John Heubusch for attorney Michael A. Dawson to appear pro hac vice (tp) [Entry date 05/07/97]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/5/97	71	MOTION by non-parties Republican Natl Committee, Natl Republican Congressional Committee, Natl Republican Senatorial Committee, Maria Cino & John Heubusch for attorney Bobby R. Burchfield to appear pro hac vice (tp) [Entry date 05/07/97]
1/23/98	123	MOTION by counter-defendant Federal Election Com for summary judgment, and to dismiss and cntclm w/prej. (jj) [Entry date 01/26/98]
		* * * * *
1/23/98	132	MOTION by defendant CO Rpblcn Fed Cmpgn, counter-claimant CO Rpblcn Fed Cmpgn for summary judgment (jj) [Entry date 01/28/98]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/23/98	140	Consent MOTION by plaintiff Federal Election Com, defendant CO Rpblcn Fed Cmpgn to dismiss Douglas L. Jones from action (jj) [Entry date 01/28/98]
1/27/98	141	ORDER by Judge Edward W. Nottingham granting motion to dismiss Douglas L. Jones from action [140-1] dismissing party Douglas Jones, party Douglas Jones (cc: all counsel); entry date: 1/28/98 (jj) [Entry date 01/28/98]
		* * * * *
2/27/98	157	REPLY by counter-claimant CO Rpblcn Fed Cmpgn to response to motion for summary judgment [132-1] (jj) [Entry date 03/02/98]
		* * * * *
2/18/99	180	MEMORANDUM, OPINION, AND ORDER: by Judge Edward W. Nottingham denying motion for summary judgment [123-1], denying motion to

DATE	DOCKET NUMBER	PROCEEDINGS
		dismiss and cntclm w/ prej [123-2], granting motion for summary judgment [132-1], granting motion for order to correct transcript [167-1] and clk shall forthwith enter jgm declaring that party Expenditure Provision is unconstitutional and cannot be enforced against dft (cc: all counsel); entry date: 2/18/99 (jj)
2/18/99	180	MEMORANDUM, OPINION, AND ORDER: by Judge Edward W. Nottingham denying motion for summary judgment [123-1], denying motion to dismiss and cntclm w/prej [123-2], granting motion for summary judgment [132-1], granting motion for order to correct transcript [167-1] and clk shall forthwith enter jgm declaring that party Expenditure Provision is unconstitutional and cannot be enforced against dft (cc: all counsel); entry date: 2/18/99 (jj)

DATE	DOCKET NUMBER	PROCEEDINGS
2/23/99	181	JUDGMENT: Approved as to Form by Edward W. Nottingham, USD Judge For the Court by Clerk James R. Manspeaker denying motion for summary judgment [123-1], granting motion for summary judgment [132-1], granting motion for order to correct transcript [167-1] party expenditure procvison is unconstitutional and cannot be enforced against dft and each party to bear own costs dismissing case (cc: all counsel); entry date: 2/23/99 (jj)
4/22/99	182	NOTICE OF APPEAL by counter-defendant Federal Election Com judgment [181-2] of 2/23/99

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-CV-1159

FEDERAL ELECTION COMMISSION,
999 E STREET, N.W.
WASHINGTON, D.C. 20463
(202) 219-3690, PLAINTIFF,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
1275 TREMONT PLACE
DENVER, COLORADO 80204
(303)893-1776

AND

DOUGLAS L. JONES,
1275 TREMONT PLACE
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(303) 893-1776, DEFENDANTS.

DEFENDANTS' FIRST AMENDED COMPULSORY COUNTERCLAIM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, ET AL., DEFENDANTS.

DEFENDANTS' FIRST AMENDED COMPULSORY COUNTERCLAIM

For its First Amended Counterclaim the Colorado Republican Federal Campaign Committe ("State Party") and its Trasurer, Mr. Douglas L. Jones, incorporate herein the averments and allegations of their Answer in this action and further aver as follows:

Jurisdiction

47. This counterclaim seeks to protect the right of the State Party and its adherents to speak and associate freely with and for Party candidates for federal office. The rights asserted arise under the First Amendment to the United States Constitution and the Federal Election Campaign Act ("FECA"). Thus, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and § 1367 (supplemental). The Supreme Court's earlier ruling in this case

recognized that jurisdiction exists over the actual controversy alleged in this counterclaim.

Parties

48. Counterclaim plaintiff, the State Party, is a political party. Its purposes are to advance Republican goals, vlaues, and principles in Colorado and to support Republican candidates for federal office from Colorado. It is funded by voluntary contributions from individuals who support its purposes and who wish to associate with other like minded individuals to speak out in support of Party candidates or in opposition to other candidates.

49. Counterclaim plaintiff, Mr. Jones, is Treasurer of the State Party, a resident and citizen of Colorado, a registered Republican voter, and an adherent of the State Party.

50. Counterclaim defendant, the Federal Election Commission ("FEC"), is an agency of the United States charged with enforcing the Federal Election Campaign Act ("FECA").

FECA Limits

51. Section 441a(d) of FECA imposes a special limit on expenditures by parties in connection with federal elections. The Supreme Court in this action has held the § 441a(d) limit unconstitutional as applied to expenditures by the State Party that are independent of its candidates. The Supreme Court remanded the issue of whether, in light of that ruling, § 441a(d) limits coordinated expenditures by a party and, if so, whether those limits are constitutional.

52. Section 441a(a)(2) of FECA limits a "multicandidate political committee" to a maximum contribution of $5,000 to any federal candidate or campaign in any year. Section 441a(a)(7)(B)(i) provides that an expenditure made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" is deemed to be a contribution. The FEC contends that, to the extent that a party's expenditure in connection with a federal election is neither independent nor authorized by § 441a(d) or § 441a(a)(2) and § 441a(a)(7)(B)(i), or otherwise, those limits are referred to herein as the "FECA Limits." This counterclaim seeks to invalidate all such FECA Limits to the extent they apply to expenditures by political parties.

Injury

54. By history and tradition the State Party, like other political parties, engages in joint political activity with its candidates for federal office. This joint activity includes "coordinated expenditures" which, as used herein, refers to expenditures that (i) are made in cooperation, consultation, or concert with, or at the request or suggestion of, the Party's federal candidates, their political committees, or their agents, (ii) are made using funds lawfully received from sources and in amounts allowed by FECA, and (iii) are made in connection with a general election for federal office.

55. The FEC historically has enforced the FECA Limits against parties that make coordinated expenditures. Indeed, this proceeding commenced as such an action by the FEC. The FEC complaint herein asserts that the FECA Limits restrict the State Party's coordinated expenditures. The FEC's general counsel has stated that consultations between a party and its candidates will disable the party from making independent expenditures in support of those candidates. Draft Advisory opinion 1996-30, *FEC Agenda Document #96-85*. The State Party faces a credible threat that the FECA Limits will be enforced against it if it makes expenditures that the FEC deems coordinated and that exceed the FECA Limits. Violation of the FECA Limits threatens substantial civil sanctions or, in some circumstances, criminal penalties.

56. The State Party's coordinated expenditures serve to communicate the Party's political views and other information to the Party's adherents and to the voters of Colorado, including Mr. Jones. The State Party can communicate its message much more efficiently and effectively if it is able to coordinate with its candidates. Similarly, voters receive a clearer and more coherent picture if the State Party and its candidates can coordinate their speech. The coordination of expenditures is an important means of political association as well as of political speech.

57. Since at least the general election of 1986, the State Party has been ready, willing, and able to make coordinated expenditures in excess of the FECA Limits, and it is and will remain ready, willing, and able to do so in 1998, 2000, and beyond. However, the State Party has been and remains chilled and deterred from making coordinated expenditures in excess of the FECA Limits by the credible threat that the FECA Limits will be enforced by the FEC or by a private complainant.

58. The FEC's general counsel has asserted a broad, though no clearly defined, understanding of the meaning of coordination. Even a successful defense of an expenditure as noncoord nated is likely to be burdensome and intrusive. The State Party has been and is chilled and deterred from engaging in activity that is not coordinated but that may be so characterized by the FEC or private complainants. Voters have thus been denied the ability to receive such speech and the ability of State Party adherents to associate for such purposes has been impaired.

59. The FECA Limits have the present and immediate effect of chilling and deterring the State Party's planning for coordinated speech. Also, the State Party's present speech is chilled and deterred by the risk that expenditures later will be held to be coordinated and counted against the Party's FECA Limits for the next elections.

60. The injuries thus suffered by the State Party, its adherents, and the voters of Colorado have been and are serious and irreparable. The injury will increase in severity as the 1998 election cycle advances, and further important opportunities to speak on vital political matters will be irrevocably lost (as already has occurred) until and unless relief is granted by the courts. The State Party and Mr. Jones have no adequate remedy at law.

Severability

61. Contrary to the FEC's position, when FECA is properly construed in light of the Supreme Court's earlier ruling in this case, it imposes no FECA Limits on coordinated expenditures of the State Party or of

other similar parties. The FEC's attempts and intent to impose such limits are unconstitutional, unlawful, and void.

62. Section 441a(d) imposes a unitary limit that does not distinguish between independent and coordinated expenditures. The Supreme Court's ruling that the limits imposed by § 441a(d) are unconstitutional as applied to independent expenditures invalidates the entire limit provision of § 441a(d) in all applications.

63. The invalidity of the limits imposed by Section 441a(d) does not invalidate the provision exempting parties such as the State Party from other FECA Limits. Alternatively, those other limits are not severable from the unconstitutional limit imposed by § 441a(d) and likewise are invalid.

First Amendment Violations

64. Contrary to the FEC's position, the First Amendment forbids the government to limit the State Party's coordinated expenditures. The FEC's attempts and intent to impose or enforce any limit on such coordinated expenditures are unconstitutional, unlawful and void.

65. To the extent that FECA Limits established by § 441a(d) or § 441a(a)(2) and § 441a(a)(7)(B)(i), or otherwise, survive the Supreme Court's earlier ruling in this case, each such limit violates the First Amendment (i) facially, (ii) as applied to political parties such as the State Party, and (iii) as interpreted by the FEC.

a. No compelling governmental interest justifies limiting the ability of the State Party to coordinate with

its candidates in the expenditure of lawfully received funds that the State Party could expend independently in support of those same candidates. In particular, such coordination does not give rise to compelling concerns about corruption, nor did Congress impose any FECA Limits on political parties because of corruption concerns.

b. If any such compelling interest were to be established, it could be adequately served by other less intrusive and burdensome means than the FECA Limits.

c. The FECA Limits are impermissibly vague and overbroad and are not narrowly tailored to any compelling interest.

d. The FECA Limits were imposed for the unconstitutional purposes of reducing the amount of political speech by political parties and equalizing the amount of speech by competing viewpoints.

e. The unconstitutional effects and nature of the FECA Limits are compounded by the low dollar limits established.

WHEREFORE the State Party and Mr. Jones request the following relief:

A. A declaratory judgment pursuant to 28 U.S.C. § 2201 that the State Party has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void.

B. Appropriate further relief pursuant to 28 U.S.C. § 2202 and the Court's equitable powers, including if necessary a preliminary injunction to protect the State Party and Mr. Jones from further irreparable injury pending the final outcome of this case.

C. An award of costs and fees and such other relief is just.

Respectfully submitted,

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November 26, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION, COUNTER-DEFENDANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, COUNTER-PLAINTIFF

FEDERAL ELECTION COMMISSION'S RESPONSE TO THE COLORADO PARTY'S STATEMENT OF UNDISPUTED FACTS AND SUPPORTING EXHIBITS

The following is the Federal Election Commission's (the "FEC" or "Commission") response to the statement of undisputed facts submitted by the Colorado Republican Federal Campaign Committee ("Colorado Party"). The Commission disagrees with many of the conclusions asserted by the Colorado Party but does not believe that any of the Colorado Party's proffered facts creates a genuine dispute of a material fact that would necessitate a trial. For example, the Colorado Party offers as facts their own characterizations and quotations from the academic experts in this case, Professors Alexander, Corrado, Sorauf, Krasno and Wilcox. In virtually every instance, these references are to the conclusions and value judgments of these professors and not to particular facts or observations. These opinions are presumably offered to assist the Court to understand the evidence, Fed. R. Evid. 702, and as opinions, are not facts that are susceptible to being admitted or denied, except to acknowledge that these are, in fact, the opinions of experts. *See United States v. Hardage*, 982 F.2d 1436, 1444 (10th Cir. 1992), *cert. denied*, 510 U.S. 913 (1993) (where a party has presented a prima facie case, the opposing party's summary judgment opposition "in the form of [conclusory] expert witness affidavits does not make it any more significant than a simple denial made in a pleading and as such is insufficient to defeat summary judgment"). This is in contrast to the facts underlying an expert's opinion, Fed. R. Evid. 703, which in the few places proffered by the Colorado Party, can be admitted or denied. The Colorado Party also submits quotations from statutes and regulations, and their own characterization of the law as facts. These also are not facts that can be admitted or denied.

For the Court's convenience, the Colorado Party's proposed facts are repeated in *italics* followed by the Commission's response. Where the Commission denies a proffered fact, the opposing facts in the Federal Election Commission's Statement of Material Facts Not in Genuine Dispute and the Supplement are denoted as "FEC facts."

1. Pursuant to the Supreme Court's earlier ruling in this case, political parties may make unlimited "independent" expenditures in support of their congressional candidates provided they do so using "hard" money. However, the FEC takes the position that if a party's spending in connection with a congressional election is coordinated in any way with the party's

candidate, then the limitations of § 441a(d) of the Federal Election Campaign Act of 1971, as amended, ("FECA"), 2 U.S.C. §§ 431-455, still apply. Under those limits, a party may spend only pennies per voter; it cannot even send a single letter to each voter or even every party member. Corrado Rpt. at 17.

The first sentence is a legal conclusion to which NO RESPONSE IS REQUIRED. As to the second sentence, the FEC's position is stated in its briefs in this matter. The FEC ADMITS that the third sentence is based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the statement speaks for itself. To the extent Prof. Corrado's statement supports the calculation described, including the assumptions and qualifications underlying the calculation, the FEC ADMITS that statement.

2. The specific limitations of § 441a(d) are in pertinent part as follows:

The National committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

This paragraph is a statement of law to which NO RESPONSE IS REQUIRED.

3. The Colorado Party is the standing arm of the Republican Party in the State of Colorado with primary responsibility for federal elections. The Colorado Party is ready, willing, and able to spend more money in connection with elections to federal office and in coordination with party candidates than is permitted by § 441a(d). Bain Decl. at ¶ 3. The Colorado Party has been chilled and deterred from making such coordinated expenditures by its well founded fear that defendant FEC will initiate an enforcement action against it. Id. at ¶¶ 3-6; Benson Aff. at ¶¶ 4-5. Indeed, the FEC's expert witnesses agree that, in the absence of FECA's limits on coordinated spending, "we would see a dramatic increase in party coordinated spending" because "coordinated spending is already the avenue of choice . . . freeing it from limits will make it the choice of all." Sorauf/Krasno Rpt. at 44, 46.

The FEC ADMITS the first sentence. The FEC admits that the second sentence is Bain's opinion of possible future events, but notes that the current financial state

of the Colorado Party as reported to the Commission does not indicate the capability to make the proffered expenditures. See FEC facts 17, 30 and 31. The FEC ADMITS that the third sentence is Bain's opinion of his state of mind, which the FEC does not contest. The FEC ADMITS that the fourth sentence is the opinion of Professors Sorauf and Krasno. As opinion, THE FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

The Unique Role Of Political Parties

4. *Political parties are "essential to the vitality of American democracy," Corrado Rpt. at 1, and are "essential democratic institutions." Sorauf/Krasno Rpt. at 38. Parties are "the principal intermediaries between the citizenry and government. They organize large numbers of individuals and political groups into collectives of active political participants and combine the diverse and diffuse views of individual members into broad-based expressions of political speech. In doing so, they help translate the needs and desires of the general public into political positions and public policies that form the basis of civic debate and government action." Corrado Rpt. at 1. "Without parties, individuals in mass society are atomized and ineffectual." Alexander Rpt. at 30.*

The FEC ADMITS that this paragraph is based upon the opinion of expert witnesses in this case. As opinion,

the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports speak for themselves.

5. *The "unique and crucial role" of American political parties includes (a) "enabl[ing] citizens to participate coherently in [our] system of government," (b) "bring[ing] fractured and diverse groups together as a unified force," (c) "provid[ing] continuity that lasts beyond terms of office," and (d) "encouraging debate and discussion of the issues." Sorauf/Krasno Rpt. at 38; see also Corrado Rpt. at 4-5 (parties promote political discussion, inform voters, enhance the accountability and responsibility of the political system, socialize citizens, and unify our highly fragmented system of government).*

The FEC ADMITS the facts but does not take a position on the opinion about unique and crucial. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY.

6. *FEC expert witness Frank Sorauf wrote, "'Political parties . . . are the only devices thus far invented by the wit of Western man that can, with some effectiveness, generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually or organizationally powerful. . . .' The political party, in other words, is the political organization of the masses who lack the cues and information—as well as the political resources of status, skills, and money—to make a major impact on public decisions via other means." Frank Sorauf, Party Politics in America at 429-30 (1984) (quoting Walter Dean Burnham, The End of American Party Politics, Trans-action, Dec. 1969, at 20; see also*

Alexander Rpt. at 29 ("One of the roles of political parties is to advocate public policies that would assist" "the poor, the black, [the] consumer[], [the] youth and the elderly.").

The FEC ADMITS that this was the opinion of Prof. Sorauf in 1984. The FEC ADMITS that the parenthetical is the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY.

7. *Congress recognizes and endorses the importance of parties. "One of the things Congress was concerned about was that [FECA] not restrict party activity unduly. [It a]lready place[d] excessive regulatory burdens on them. That is one of the reasons we got the amendments to the [A]ct. . . . That is one of the reasons why Congress in '79 changed [the law,] especially the definition of contribution and expenditure to free up the parties to spend monies on ["party building, or get out the vote, or traditional . . . campaign paraphernalia, bumper stickers or buttons or slate cards"] as a way to ensure that we could have robust debate[,] competition[,] party building and voter outreach. That's all essential." Corrado Dep. at 42-43.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; his testimony speaks for itself.

8. *The unique role and status of American political parties is recognized by Congress. FECA defines "political party" to mean "an association, committee or organization which nominates a candidate for election to any Federal Office, whose name appears on the election ballot as the candidate of such association, committee, or organization." § 431(16). FECA also defines "national committee" as the body "responsible for the day-to-day operation of such political party at the national level," § 431(14), and "state committee" as the corresponding body "at the state level," § 431(15).*

Whether political parties roles are unique is an opinion, which the FEC NEITHER ADMITS NOR DENIES. The remainder of the first sentence and the second and third sentences represent statements or conclusions of law which the FEC NEITHER ADMITS NOR DENIES; the statute speaks for itself.

9. *FECA includes a number of provisions in which parties are dealt with separately from other participants in the political process. E.g., § 431(8)(B), (9)(B) (authorizing "grass-roots" political activities); § 441a(a) (permitting individuals to contribute more money to a party than to a candidate or to other political committees); § 441a(d) (creating, in part, an exception to the expenditure and contribution limitations thereby allowing parties to make limited "expenditures in connection with the general election campaigning of candidates for Federal office"); see also S. Rep. No. 93-689, p. 7 (1974) ("[A] vigorous party system is vital to American politics . . . . [P]ooling resources from many small contributors is a legitimate function and an integral part of party politics.").*

This paragraph contains statements or conclusions of law which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY.

10. *Likewise, the regulations adopted by the FEC acknowledge the special status of political parties.* See, e.g., *11 CFR § 110.1(c) (1997) (providing that individuals may make contributions of up to $20,000 to political parties); § 110.2 & .3 (identifying various contribution limits for national and state political parties); § 110.7 (stating political party expenditure limitations).*

This paragraph contains statements or conclusions of law, which the FEC IS NOT REQUIRED TO ADMIT OR DENY.

11. *Similarly, the Supreme Court has long recognized the importance of political parties.* E.g., Tashjian v. Republican Party of Conn., *479 U.S. 208, 214-16 (1986). In the instant case, Justice Kennedy explained that "[p]olitical parties have a unique role in [ensuring "that debate on public issues [are] uninhibited, robust, and wide-open']; they exist to advance their members' shared political beliefs."* Colorado, *116 S. Ct. at 2322 (Kennedy, J., concurring in the judgment and dissenting in part) (quoting* New York Times Co. v. Sullivan, *376 U.S. 254, 270 (1964)). The Supreme Court plurality in this case similarly recognized that "the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections."* Id. *at 2317;* see also Federal Election Comm'n

v. Democratic Senatorial Campaign Comm., *454 U.S. 27, 41 (1981) (concluding that § 441a(d)(3) was part of a "general scheme" intended to "assur[e] that political parties will continue to have an important role in federal elections").*

This paragraph contains statements or conclusions of law, which the FEC IS NOT REQUIRED TO ADMIT OR DENY.

12. *"The chief function parties perform is to contest elections." Corrado Rpt. at 2. Their distinctive objective is to build legislative majorities and help to organize government.* Id. *at 4, 21. "Parties seek to communicate their views and coalesce diverse interests behind policy positions predominantly through electoral activity. Party organizations concentrate a substantial share of their resources and activities on political campaigning. They play a central role in recruiting candidates, raising campaign funds, communicating information to voters, and encouraging citizens to vote. They develop messages and platforms designed to appeal to broad-based majorities in an effort to win elections and build legislative majorities. These messages provide voters with outlooks that help them comprehend the choices available and structure their decision making. In particular, the parties provide citizens, especially those who identify themselves as party supporters, with perceptual frameworks and voting cues that help them assess candidates and issues."* Id. *at 1;* accord *Alexander Rpt. at 9; § 431(16) (defining "political party" as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears*

on the election ballot as the candidate of such association, committee, or organization").

The FEC ADMITS the activities of parties described in sentences one through eight, but the characterization of those activities are based on the opinion of expert witnesses in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports speak for themselves. The ninth sentence is a statement of law which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY.

13. *Timothy Wirth, FEC witness and former Senator, concurred, "[P]olitical parties can do a good job in terms of helping to focus debate," but warned that because political parties are having a difficult time playing "that kind of role" anymore, that the media, and "any kind of a middle man" may be taking over that role now. Wirth Dep. at 55-56. Similarly, Professor Herbert Alexander stated, "[P]reventing parties from electioneering will only leave message presentation up to uncontrollable and unaccountable special interests." Alexander Rpt. at 26.*

The FEC ADMITS the first sentence. The FEC ADMITS that the second sentence is based on the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

14. *"American political parties are among the oldest in the world, but their power has waned in the last half century. Historically, the parties suffered when civil service and professionalization replaced patronage; when primaries took candidate selection out of their hands; when government began to provide social services the urban party organizations used to attract the allegiance of voters; when television focused dramatically on the candidate independent of his or her party; when immigration declined, the movement to the suburbs accelerated, and urban party organizations lost some of their support and reasons for being; when education led to the ethic to vote for the 'better person', [sic] however perceived, leading to increased ticket-splitting." Id. at 9. "The diminished power of the parties makes the game of politics more difficult for the [powerless electorates] to play and win. Finally, the continued decline of the parties would rob the political system of an important building of majorities. . . . With weakened parties how are we to find majorities in a fragmented politics?" Frank Sorauf, Party Politics in America at 430.*

The FEC ADMITS sentences one through eight are based on the opinion of expert witnesses in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports speak for themselves.

15. *The increasing complexity and lack of clarity of FECA has also burdened parties to the extent that many state parties are hesitant to assist federal candidates. Howard ("Bo") Callaway, former chairman of the Colorado Party stated that with "federal candidates, which come under the FEC, there are rules that*

to the average nonlawyer state chairman are so complex and so difficult that many people just say I just won't play in that league. . . . You always run the risk of being harassed, of having the opponent complain you violated the law, and defending yourself, and the whole gamut . . . is subject to federal laws that are seen to be extremely complex. . . . Many states . . . say, 'Look, it is tough enough anyway, we don't play in the federal game.' That is a shame. Parties should play in the federal game. Parties are designed to help [candidates, but] the rules make it so complex [that] it is very difficult." Callaway Dep. at 53-55.

The FEC ADMITS that this represents the opinion of Mr. Callaway. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY.

16. *The expert witnesses and party witnesses recognize the crucial role of political parties. FEC expert witness Frank Sorauf declared that "the two great national parties bring a unifying, centripetal force. . . . Their similar symbols and traditions . . . are a force for unity in governmental institutions marked by decentralization and division." Party Politics in America at 15. Professor Anthony Corrado opined, "[P]arties play a fundamental role in the organization of elections" and "have a recognized status under law that is not shared by other organized political groups." Corrado Rpt. at 8. In short, "'there is no America without democracy, no democracy without politics, and no politics without parties.'" Alexander Rpt. at 8 (quoting Clinton Rossiter, Parties and Politics in America 1 (Cornell University Press, 1960); see also*

Coelho Dep. at 19-21, 105; Simon Dep. at [illegible]; Wirth Dep. at 54-56.

The FEC ADMITS the first sentence except that the characterization "crucial" is an opinion. The FEC ADMITS that the second through fifth sentences are based on the opinions of expert witnesses in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports and other writings speak for themselves.

Party Finances – Hard Money, Soft Money, Disclosure

17. *American political parties "have no money of their own." Sorauf/Krasno Rpt. at 37; see Corrado Rpt. at 8. In contrast to economic entities, their ability to spend in support of their candidates depends entirely on their ability to attract voluntary contributions, which, in turn, depends directly on their level of popular support. See Sorauf/Krasno Rpt. at 37, 42. Party conduct disapproved of by the public translates into reduced contributions. Sorauf/Krasno Rpt. at 42. Professor Corrado notes, as an example of this, that approximately 200,000 donors to the Republican National Committee ("RNC") ceased giving during the Bush administration. Corrado Dep. at 71. The RNC realized that it was not appealing to its base. Id. By being responsive to this indicator, the RNC "not only brought back those 200,000 small donors, but added in 200,000 new smaller donors to give themselves a very broad base of support, that was the base of the strength they had entering [the] '96 election." Id. at 72. A corporation, in contrast, is lawfully enabled by its*

corporate form to amass "large aggregations of wealth" based on approval in the marketplace rather than the public's support of its policy positions or its political contributions. Id. at 91.

The FEC ADMITS the facts described in this paragraph but the characterizations of those facts are the opinions of expert witnesses in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports speak for themselves.

18. *"Hard money" is the common term for the limited, disclosed funds parties raise from individuals and political committees in conformity with FECA limits. FECA currently permits parties to use hard money in restricted amounts for expenditures "in connection with" a federal election. § 441a(d). Only hard money may be used by parties to expressly advocate the election or defeat of federal candidates . Id.*

The FEC ADMITS that "hard money" is a common term. The remainder of this paragraph contains statements or conclusions of law which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY.

19. *Parties may accept hard money contributions only from specified sources and in limited amounts. Individuals may contribute an aggregate amount of $25,000 per year to federal candidates and campaigns, and federal and state parties. § 441a(a)(3). Of this, no more than $20,000 may go to any national party, and*

no more than $5,000 may go to any state party. § 441a(a)(1)(B), (C). Corporations and unions may not contribute hard money. § 441b(a). However, their political action committees ("PACs") may contribute up to $15,000 per year to a national party and $5,000 per year to a state party with no aggregate limit. § 441a(a)(2)(B), (C).

This paragraph contains statements or conclusions of law which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY.

20. *"Soft money" is the term commonly applied to contributions given to political parties from sources or in amounts that FECA does not regulate. These funds may be spent for state election activity and non-election activity such as issue advertising, "get out the vote" campaigns, and other party building activities. § 431(8)(B). Soft money may not be used "in connection with" federal elections and hence it may not be used for coordinated or independent expenditures. Thus, soft money expenditures are not at issue in this case. Corrado Dep. at 35-36.*

The FEC ADMITS that "soft money" is a common term. The remainder of this paragraph contains statements or conclusions of law which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY. The last sentence is a statement of the Colorado Party's position in this litigation, which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY.

21. *Political issue advocacy describes political speech that may mention specific political parties or even candidates but does not "expressly advocate" the election or defeat of a clearly identified federal candidate. Buckley, 424 U.S. at 42; Federal Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049, 1051-53, 62 (4th Cir. 1997). "Issue ads" are an increasingly controversial phenomena due to several factors. First, the large amounts of money spent by organizations and interest groups in the 1996 elections piqued the public interest. Second, despite the impact these ads can have on federal elections, because they are not deemed to be "in connection with a federal election," no organization is exempted from making these ads, there are no limits on how much can be raised or spent, and there are no requirements that sponsoring organizations disclose the sources of their funding, or where or how it was spent. Nonetheless, issue ads are also not at issue in this case.*

The first sentence is a statement of law, which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY. Sentences two through four are unsubstantiated by any evidence in the record; therefore, the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY. Furthermore, they represent some unknown person's opinions, which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY. The last sentence is a statement of the Colorado Party's legal position in this case, which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY.

22. *Party expenditures expressly advocating the election or defeat of a federal candidate may be either "independent" or "coordinated."*

This is a statement or conclusion of law, which does not require a response; but if one were required the FEC would ADMIT the statement in this paragraph.

a. *The term "independent expenditures" describes hard money expenditures expressly advocating the election or defeat of a federal candidate, see 11 CFR 100.22(a), that are not coordinated with the candidate. 11 CFR 109.1. As applied to parties, "[i]ndependent spending [] requires the party committee to stay at a safe distance from the candidate and the candidate's campaign plans and strategies." Sorauf/Krasno Rpt. at 45.*

The first sentence is a statement of law which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY. The FEC ADMITS that the second sentence is based on the opinion of Profs. Sorauf and Krasno. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

b. *The term "coordinated expenditures" is commonly used to describe hard money expenditures by a political party that are (i) coordinated with a candidate and (ii) in "connection with the general election campaign of candidates for Federal office." § 441a(d)(1). "[A]ll coordinated expenditures have to be disclosed. Any monies that the parties spend on behalf of can-*

didates are disclosed . . . in great detail." Corrado Dep. at 291.

The first sentence is a statement of law which the FEC IS NOT REQUIRED TO EITHER ADMIT OR DENY. The FEC ADMITS the second sentence.

23. *"The hard monies that are used for coordinated expenditures are generated through ongoing fundraising operations that include direct mail solicitations, telemarketing efforts, party fundraisers, an annual congressional dinner, and the solicitation of individual donors. The vast majority of the monies used for coordinated expenditures are generated through contributions of relatively small amounts from individual donors." Corrado Rpt. at 20; see Barbour Dep. at 22-23, 39 (noting that more than 70 percent of the Republican National Committee's ["RNC"] revenue came in contributions of $100 or less and that PAC contributions made up only about one percent of the RNC's total revenue).*

The FEC ADMITS that funds are raised in the manner described, but the characterizations of the relative amounts and the suggestion that this is an all inclusive list in the first and second sentences are based on the opinion of Prof. Corrado; to the extent these facts are supported by his statement, the FEC ADMITS them. With respect to the statements regarding RNC fundraising by Mr. Barbour during his tenure as Chairman, the FEC ADMITS.

24. *Most of the hard money raised by the two national political parties through their national party committees comes from individual donors whose average contribution size is under $40. Coelho Dep. at 24, 36; Heubusch Dep. at 99; cf. Barbour Dep. at 23 (stating that the RNC was "averaging about $50 a contribution"). These hard money contributions overwhelmingly result from direct mail solicitations. Barbour Dep. at 22; Cino Dep. at 53, 77; Coelho Dep. at 23-24, 36. Similarly, with state parties "the [fundraising] effort is a lot of grass roots [such as] small donor via telephone and direct mail." Hesse Dep. at 25.*

With respect to the first sentence the FEC ADMITS that Mr. Coelho described the average size of DCCC donations during his tenure as Chairman in the 1980's, and that Mr. Heubusch and Mr. Barbour described the size of average donations to the NRSC and the RNC respectively during their tenure on those committees. The FEC ADMITS the second and third sentences.

25. *The mail solicitation process both raises party funds and engages contributors directly in the formulation and advancement of party policy. Coelho Dep. at 23-24. The process "is administratively very expensive. Usually a first round of direct mail is a net loss, with far more spent on administrative costs than is received in contributions. . . . Direct mail fundraising makes its money on the second, third and subsequent mailings to that group of known givers." California Prolife Council Political Action Comm. v. Scully, No. Civ. S-*

96-1965, Findings of Fact, at ¶ 99 (E.D. Cal. Jan. 6, 1998) (www.caed.uscourts.gov).[1]

The first sentence incorrectly characterizes the testimony of Mr. Coelho, which speaks for itself, and therefore the FEC NEITHER ADMITS NOR DENIES. The Commission objects to proffered facts from *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, 1997 WL 7173, at *15 n.1 (E.D. Cal. Jan. 6, 1998). The Commission was not a party to that suit, and thus has not been given an opportunity to review, challenge or respond to the evidentiary bases on which the findings were made. Furthermore, the Colorado Party has not submitted the evidence from the *Scully* case to this Court. We also note that *Scully* involved a challenge to a California state law which imposed restrictions on the amount non-federal candidates may raise and spend in their non-federal campaigns. Accordingly, the evidence introduced in *Scully*, and the corresponding findings of fact, do not relate to federal campaigns, federal candi-

[1] *The opinion (available on Westlaw) is a separate document from the findings of fact (at time of writing, only available on the Internet) "because they consist of some 456 findings." California Prolife Council Political Action Comm. v. Scully, No. Civ. S-96-1965, 1997 WL 7173, at *15 n. 1 (E.D. Cal. Jan. 6, 1998). All references to Scully in the undisputed facts are to the findings of fact.*

dates, federal political committees, or the Colorado Party.

26. *In this case, the Colorado Party challenges limits imposed by FECA on party spending that is coordinated with candidates in connection with a federal election, a type of spending permitted only with hard money. The Colorado Party does not challenge FECA's prohibition on raising or spending soft money nor does it challenge provisions of FECA requiring parties to provide detailed reports to the FEC disclosing the sources, amounts, and expenditures of their money, both hard and soft. See § 434. These reports are available to the public and are regularly scrutinized by opposing parties and the media.*

The first two sentences are legal descriptions of the Colorado Party's position in this matter; therefore, the FEC NEITHER ADMITS NOR DENIES. THE FEC ADMITS the third sentence.

27. *This case concerns privately funded election campaigns. It does not challenge the coordinated expenditure restrictions in connection with publicly funded presidential elections.*

These sentences are legal descriptions of the Colorado's Party's position in this matter; therefore, the FEC NEITHER ADMITS NOR DENIES.

Both documents, however, are provided in Volume III, Exs. U, V, for the convenience of the Court.

Parties And Their Candidates

28. *"It is a natural relationship for parties and candidates to work together toward the common goal of winning elections." Alexander Rpt. at 25. FECA recognizes that candidates for federal office appear "on the election ballot as the candidate of such [political party]." § 431(16). The Supreme Court plurality in this case recognize the intimate relationship shared by political parties and the campaigns of party candidates. Colorado, 116 S. Ct. at 2317- 19; see also id. at 2323 (Kennedy, J. concurring in the judgment and dissenting in part) (noting that the fates of political parties and their candidates are "inextricably intertwined"). "This close relationship does not increase the risk of corruption, but rather encourages party committees to support with funding candidates who are faced with millionaire opponents, negative independent expenditures or negative issue advertising by independent groups." Alexander Rpt. at 25.*

The FEC ADMITS that the first and fourth sentences are based on the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; his report speaks for itself. The second and third sentences are statements or conclusions of law which the FEC NEITHER ADMITS NOR DENIES; the statute speaks for itself.

29. *The FEC long took the position that an expenditure by a party in connection with a federal election*

was unavoidably an expenditure coordinated with the party's candidate. FEC Advisory Opinion 1988-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5932, p. 11,471 n. 4 (1988); see FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 5819, p. 11,186 n. 4 (1985) ("Party political committees are incapable of making independent expenditures."); FEC Advisory Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 p. 11,070 n. 2 (1984) (same); see also 11 CFR § 110.7(b)(4) (forbidding national and state party committees from making "independent expenditures in connection with the general election campaign[s]" for federal office) (repealed in the aftermath of Colorado). In making its ruling in this case the Supreme Court held that it was possible for parties to make independent expenditures that advocate the election or defeat of a candidate, so long as there is no coordination in fact. Colorado, 116 S. Ct. at 2315.

This paragraph contains statements or conclusions of law which the FEC is not required to EITHER ADMIT OR DENY.

Independent And Coordinated Spending

30. *Independent expenditures are unnatural for parties and create an artificial separation of the party and its candidate. Alexander Rpt. at 25. Accordingly, a party now faces the quandary of how it can communicate with its candidates, "while at the same time not communicate when providing independent expenditures on behalf of its candidate or against its candidate's opponent." Id. at 26. The task of assuring that*

such expenditures are not coordinated with a party's candidate has proven cumbersome, inefficient, and expensive. Corrado Rpt. at 35-37; Sorauf/Krasno Rpt. at 44; Bain Dep. at 46-47. "Independent expenditures are not natural acts for parties. The normal workings of parties include: recruiting candidates and writing platforms, raising funds to support those [] candidates and organizing voters." Alexander Rpt. at 25.

The FEC ADMITS that this paragraph is based on the opinion of expert witnesses in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports speak for themselves.

31. *Assuring that expenditures are "independent" requires a party, whose natural role is to work closely with its candidates, "to stay at a safe distance from the candidate and the candidate's campaign plans and strategies." Sorauf/Krasno Rpt. at 45. This, of course inhibits "a unified message." Id.; see Corrado Rpt. at 37. The current system of unlimited independent spending and severely restricted coordinated spending places "enormous regulatory burdens" on parties and creates "a sloppy area of the law." Corrado Dep. at 54-56. Moreover, even where care is taken to assure that the expenditures are not coordinated, the inevitable close ties between party and candidate mean there is a constant threat that the FEC, perhaps at the instigation of the opposing party or candidate, will challenge the independence of the expenditure. Sorauf/Krasno Rpt. at 46; Bain Dep. at 47.*

This paragraph contains legal conclusions and the opinion of expert witnesses in this case. As legal conclusions and opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports speak for themselves.

32. *To avoid claims of coordination, each of the major party organizations in 1996 established a "separate entity that was solely responsible for making independent expenditures. Each party had to rent and furnish an office, hire staff, and pay other administrative costs. They had to engage additional consulting services and duplicate many of the functions already being undertaken by other party offices." Corrado Rpt. at 36-37; see Barbour Dep. at 100. This process was "cumbersome, complicated, and time-consuming." Corrado Rpt. at 37. These complications and arrangements "tend to isolate the party . . . from candidates [and] destroy[] the healthy relationship among candidates and parties whose labels they use." Alexander Rpt. at 25. Moreover, such independent expenditures "do not qualify for the lowest unit rates on the purchase of broadcasting time," as coordinated expenditures would. Corrado Rpt. at 37; see 47 U.S.C. § 315(b) ("The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed . . . the lowest unit charge of the station for the same class and amount of time for the same period. . . ."); 47 CFR § 73.1942 (1997) (implementing and defining requirement that broadcasters sell advertising time to candidates at the lowest unit charge of the station); see also CBS, Inc. v. FCC, 453 U.S. 367, 379 (1981) (discussing the broadcast provisions of FECA, the Court stated that "all three measures, while differing in approach, were 'intended to increase a*

candidate's accessibility to the media and to reduce the level of spending for its use'") (quoting FECA of 1971: Hr'gs on S.1, S. 382, and S. 956 before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 1st Sess., 2 (1971) (remarks of Sen. Pastore)).

The FEC ADMITS that national parties established entities that made independent expenditures that were not subject to the FCC regulations pertinent to other party expenditures. To the extent the remainder of paragraph describes regulations or restates the opinions of expert witnesses in this case, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the regulations and reports speak for themselves.

33. *"In our candidate-centered culture, it is desirable to keep candidates close to the parties on whose tickets they run. Parties have concerns other than merely electing a president or a senator; there is some thought to the future, to long-term responsibility to protect the party's reputation. Ultimately, the way to get more accountability and responsibility in political finance would seem to be through democratically-reformed and strengthened political parties, not by enhancing candidate independence." Alexander Rpt. at 24. "The party is here to stay. . . . The party can't afford to get in a situation that is corrupt or corrupting because the party has to be held accountable, and the party is held accountable through the ballot." Alexander Dep. at 111-12.*

The FEC ADMITS that this is the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

34. *As previously noted, the FEC experts agree that "coordinated spending would immediately solve the problems" such as those identified above and state that "freeing [coordinated expenditures] from limits will make it the choice of all." Sorauf/Krasno Rpt. at 45-46.*

The introductory and intermediate clauses are conclusions of an unknown person, which does not warrant a response. The FEC ADMITS that this paragraph contains the opinion of Profs. Sorauf and Krasno. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

35. *In discussing past experiences with independent expenditures from non-party entities, FEC Witness Timothy Wirth called independent expenditures "devilishly horrible things" that are increasingly "well coordinated." Wirth Dep. at 80, 78. He particularly loathed non-party independent expenditures because they are almost always negative and decries them as "another part of what's tearing down the American political system." Id. at 80.*

DENY that this is an accurate characterization of Sen. Wirth's statement, which speaks for itself. FEC ADMITS that some non-party entities make some

independent expenditures that Senator Wirth does not like.

36. *John Heubusch, former Executive Director of the National Republican Senatorial Committee, testified that independent expenditures had in some instances actually been counterproductive and that in the future he "would advise . . . that the chairman not . . . engage in independent expenditure activities." Heubusch Dep. at 102, 106.*

ADMIT that this is an accurate characterization of Heubusch's statement.

37. *Similarly, the Colorado Party does not plan on making independent expenditures because parties "need to spend [their] money efficiently and . . . independent expenditures[,] which are totally separate and apart from the campaign and the candidate and the candidate's message . . . [,] is not an efficient way to spend money. It is much more efficient if [parties] can work with the candidate to be part of . . . a unified campaign and a unified message. Furthermore, it also raises the issue of both the . . . factual and legal issues of what is independent and what is not independent. Parties need clarity, speed, and . . . don't need hassles with the other party . . . or with the regulators." Bain Dep. at 47.*

The FEC ADMITS that this paragraph is the opinion of Donald Bain about possible future events.

38. *"Independent expenditures raise questions about accountability; independent expenditures can shape campaign discourse and popular opinion but, unlike candidates and parties, individuals and groups engaging in independent expenditures do not appear on the ballot and, as a result, cannot be electorally rewarded or punished for their conduct. Thus, despite their disclosure, independent expenditures lack accountability and they are an inefficient way to campaign." Alexander Rpt. at 24-25.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

39. *With independent expenditure campaigns "[c]andidates have no control over the political message that is distributed and that may be attributed to them [and] [c]andidates are also not accountable for political messages or promises attributed to them." Scully, at ¶ 360. Moreover, "[s]ome voters are likely to attribute to candidates messages that are being distributed by independent expenditure campaigns, resulting in voter confusion." Id. at ¶ 361.*

The Commission objects to proffered facts from *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, 1997 WL 7173, at *15 n.1 (E.D. Cal. Jan. 6, 1998). The Commission was not a party to that suit, and thus has not been given an opportunity to review, challenge or respond to the evidentiary bases on which the findings were made.

Furthermore, the Colorado Party has not submitted the evidence from the *Scully* case to this Court. We also note that *Scully* involved a challenge to a California state law which imposed restrictions on the amount non-federal candidates may raise and spend in their non-federal campaigns. Accordingly, the evidence introduced in *Scully*, and the corresponding findings of fact, do not relate to federal campaigns, federal candidates, federal political committees, or the Colorado Party.

40. *The FEC's experts concur that "as an avenue for party assistance to candidates, coordinated spending is far more valuable than the other two party options: contributions or independent expenditures." Sorauf/ Krasno Rpt. at 44-45; accord Cino Dep. at 110; Coelho Dep. at 107-110; Hesse Dep. at 59, 88; Heubusch Dep. at 103.*

The FEC ADMITS that this paragraph is based on the opinion of experts in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports and testimony speak for themselves.

Coordinated Party Expenditures Are Made To Communicate

41. *"Party coordinated funding is used almost exclusively to help candidates communicate more effectively with the public. Parties and candidates both know that voter communication is the key to winning elections. Candidates must develop a message that is meaningful to voters and have the resources needed to present that message to the electorate. To have their voices heard in modern election campaigns, candidates rely on television or radio advertising, or direct mail, the latter being the preferred medium for many congressional candidates, since broadcast vehicles like television or radio usually have audiences that span more than one congressional district." Corrado Rpt. at 28. "[A]ll of these methods of communicating are expensive." Id.*

The FEC ADMITS that the listed methods of communicating occur. The remainder of his paragraph is based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

42. *"Over 90 percent of the monies spent by national party committees on behalf of their candidates is spent on political communication. And most of the other 10 percent is spent on issues research and polling, which is used to help candidates develop and target their campaign messages." Id. at 30.*

The FEC ADMITS these fact as qualified by Prof. Corrado in his report.

43. *Parties also provide "the funding needed to broadcast their messages or post letters to selected voters," and "support their candidates' speech" through "state of the art television and radio production*

facilities on their premises, which are used to give candidates technical and editorial assistance." Id. at 29. Parties "produce 'generic' ads each election cycle that include general party messages and themes, which can be customized for particular candidates by incorporating a candidate's name, picture, and voice." Id. "In doing so, a party fulfills one of its principle objectives, since the main way a party's ideology and policy perspectives become known to the electorate, and thus the primary way it generates public support, is through the speech of its candidates. Parties therefore have a keen interest in promoting the widespread airing of their candidates' views." Id.

The FEC ADMITS the first and second sentences. The FEC ADMITS that the third and fourth sentences are based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

Parties and PACs Comparison

44. *"Political parties have some surface similarities with PACs and other groups: they all act in the political arena, they all seek to elect candidates of their choice, they all spend money, they all want some policy outcome. But parties have one vital difference from interest groups: while the various interest groups (and their PACs) usually have one specific goal or concern, political parties represent an amalgam or coalition of interests and goals; moreover, the purpose of parties is to gain control of government, rather than to pursue*

single goals, as PACs do." Alexander Rpt. at 17. Candidates run as the nominees of their party. § 431(16).

The FEC ADMITS that the first and second sentences are based on the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself. The FEC ADMITS the third sentence. To the extent that this paragraph is a statement of law, no response is required.

45. *"Political parties seek to win elections by bringing together coalitions of [various individuals and interest] groups and by articulating issues that will resonate with voters. Political scientists generally value this activity as important consensus building in a diverse democracy." Alexander Rpt. at 17. FEC expert witness Sorauf notes that while "[o]ther nonparty organizations may raise funds, organize endorsements, and recruit workers for some candidate's campaign[,] parties are occupied with contesting elections in a way and to a degree that the other political organizations are not. Indeed, their names and symbols are the ones the states recognize for inclusion on most ballots." Party Politics in America at 16.*

The FEC ADMITS that this paragraph is based on the opinion of experts in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY.

46. *Another difference between parties and "special interest groups or PACs [is that] parties must appeal to majorities in the electorate if they are to win; and*

unlike single issue organizations, they must win races if they are to govern. Parties thus give coherence to American politics. Parties have been a unifying force in this system, building coalitions and making mass democracy possible." Alexander Rpt. at 18. As Professor Sorauf explains, parties have the "ability to make hard political choices, to pursue a collective electoral strategy that will maximize—or will work toward maximizing—the number of victories for a given expenditure of money." Frank Sorauf, Money in American Elections 142-43 (1988); see Corrado Rpt. at 21-22.

The FEC ADMITS that this paragraph is based on the opinion of experts in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY.

47. *Achieving control of the government requires cooperation among party supporters across the boundaries of states or electoral districts. Through parties, citizens and candidates associate with one another and speak out in support of their political interests. To do this parties must "communicate as widely as possible, and [they] do[] this in part on [their] own and in part through [their] candidates. In lieu of unlimited party support, PACs representing special interests compete for the candidates' attention. It enhances democracy to encourage the broader interests parties represent, than the narrower interests of PACs." Alexander Rpt. at 18.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Alexander. As opinion, THE FEC IS

NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

48. *"Party support leads to increased accountability, and hence is highly desirable." Id. "If the voters don't like what the candidate does, if the voters don't like what the party does, they can vote against the candidate, they can vote against the party. They can't vote against the PAC. They can't vote against the AFL-CIO or the Christian Coalition because they are not on the ballot." Alexander Dep. at 115.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report and testimony speak for themselves. The FEC ADMITS that the AFL-CIO and the Christian Coalition are terms that do not appear on the ballot, but do not have sufficient evidence to admit or deny that voters do or do not make electoral decisions based on whether a candidate is the "AFL-CIO candidate" or the "Christian Coalition candidate."

Public Perception And Reality

49. *According to the FEC's proffered expert witness on public opinion, Clyde Wilcox, no evidence exists indicating that the public is aware of, much less concerned about, coordinated expenditures. Wilcox Rpt. at 1-2. He says that present public attitudes reflect profound ignorance of how federal election laws work. Id.*

at 2. He notes that most Americans are not even aware that FECA limits the abilities of corporations or private citizens to donate their own funds directly to candidates. Id. FEC witness Wirth agrees: "I don't think anybody has any idea that [a coordinated limit] exists." Wirth Dep. at 69. Maria Cino similarly testifies that "99 percent of the American public" lacked any idea about limits on party spending in support of their candidates. Cino Dep. at 123-24; accord Williams Decl. at ¶ 11.

The FEC ADMITS that this paragraph is based on the opinion of experts in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports and testimony speak for themselves.

50. *Professor Sorauf concurs that public opinion concerning campaign finance issues lacks touch with "reality," 94 Colum L. Rev. at 1359, and asserts that, in the public perception, "[m]oney . . . has come to explain too much too easily in the new epistemology." Inside Campaign Finance, at 24.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Sorauf. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the law review article speak for itself.

51. *Professor Sorauf attributes the public's misunderstandings in large part to the mass media, noting that "its mythmaking has been especially important." 94 Colum. L. Rev. at 1356. He points out that, in addition to the "worldviews of Populism and Pro-*

gressivism" characteristic of reporters, the problem flows from "the very nature of the journalistic enterprise: the need for simplicity, for personalization, for conflict, for change and novelty, and for bad or shocking news." Id. at 1356 n. 33. He also notes that stories about campaign finance tend to serve to fill up "a slow news day," observing that "an inordinate proportion of stories on campaign finance appear on Sunday television or in Monday morning newspapers." Inside Campaign Finance, at 162.

The FEC ADMITS that this is this paragraph is based on the opinion of Prof. Sorauf. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the law review article and book speak for themselves.

52. *Professor Wilcox reported a generalized concern over "foreigners contributing money," of special access for "large donors," and regarding "large donations" to parties. Wilcox Rpt. at 2-5. Foreigners cannot contribute hard money, which is the only type that may be used for coordinated expenditures. § 441e. And as previously noted, the size of hard money contributions is limited by FECA. § 441a.*

The FEC ADMITS that the first sentence is based on the opinion of Prof. Wilcox. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself. The second and third sentences are statements or conclusions of law to which no response is required.

53. *Professor Wilcox recognizes that, since the public does not know that party coordination with candidates is limited, changing or eliminating the limits on the ability of parties to coordinate their spending with their candidates would not, in itself, affect public perceptions at all . Wilcox Rpt. at 2. He says, however, that a "flood of new party spending" would feed the public's general disenchantment. Id. at 2.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Wilcox. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

Effects Of Striking Down FECA's Limits On Coordinated Spending

54. *There is no evidence that eliminating FECA's restrictions on coordinated spending by political parties would produce a "flood of new party spending," Id. at 2 (a term not defined by the FEC experts), or even that total party spending would increase. Parties already are raising and spending as much money as they can. See Corrado Dep. at 265-67. To the extent that there is any evidence as to the likely effects of removing barriers to coordination between parties and their candidates, the likely consequences are two: (a) present independent expenditures by parties will tend to be reallocated to coordinated expenditures, and (b) because the relative value of hard money versus soft money will be increased, parties will tend to give greater emphasis to raising hard money rather than soft money. Alexander Dep. at 215; Corrado Dep. at 128-29. Neither of these consequences implies any*

additional party spending. Moreover, FECA's limits on hard money contributions inhibit "large" donations. See Alexander Dep. at 215.

The FEC ADMITS that this paragraph is based on the opinion of experts in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports speak for themselves.

Coordinated Expenditures Are Not Corrupting

55. *The coordinated expenditure "limits were enacted with a view to reducing overall spending, not because coordinated expenditures were in any way considered to be corrupting." Alexander Rpt. at 14-15. "In the decades since 1974, when coordinated expenditures were allowed for both presidential and congressional campaigns, there has not been any dispute relating to them, no charges of corruption or the appearance thereof, so clearly coordinated expenditures could be increased substantially or unlimited without fear of corruption." Alexander Rpt. at 14.*

The first sentence is the opinion of an expert on a conclusion of law for which no response is necessary. The FEC ADMITS that second sentence is based on the opinion of Prof. Alexander. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

56. *FEC witnesses Sorauf and Krasno acknowledge that "many scholars and observers . . . argue that*

money in passing through a party is somehow purified of the interests and demands of the original source and is, therefore, benign in its effect on the candidate who receives it or benefits from it." Sorauf/Krasno Rpt. at 10-11.

The FEC ADMITS that this paragraph is based on the opinion of Profs. Sorauf and Krasno. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

57. *"There is no academic analysis or scholarly study conducted to date that demonstrates that parties are corrupted by the federally regulated contributions, the so-called 'hard money funds' they receive from donors. None of the studies of party finance or party coordinated spending contend that these funds are corruptive or generate the appearance of corruption in the political process." Corrado Rpt. at 43. Professor Corrado's research indicates that "parties do not allocate these funds on the basis of a candidate's position on any particular issue," but rather on elections where their funds are most likely to make a difference on the outcome. Id.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Corrado as qualified in his deposition and report; *i.e.* scholarly research cannot rule out that this occurs, see FEC fact 308. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

58. *No witness or expert for any party has identified any instance in this century in which a member of Congress took official action as a quid pro quo for any contribution to a political party, let alone for a hard money contribution made pursuant to the limitations and disclosure requirements of FECA. To the contrary, every witness that opined on this matter testified that corruption did not occur with parties and their congressional candidates. Barbour Dep. at 115-21; Coelho Dep. at 109-10, 118-20; Hesse Dep. at 87-88; Heubusch Dep. at 103; Wirth Dep. at 38, 42-43; see also Wirth Dep. at 43 (responding to a question asking whether the Republican Party in Colorado was corrupt, the Democratic candidate targeted by the ads originally at issue in this case stated, "no"); Decl. of P. Williams at ¶ 8 (Pat Williams, FEC witness and former nine-term Congressman, testified that "no party committee ever asked me for anything in return for their support.").*

DENY. See FEC facts 94, 179, 205,250, 251, 262, 263.

59. *Professor Sorauf, the FEC's expert witness, notes that "[f]or all the betrayal of public trust set out in the Watergate papers, there were no instances of quid pro quos for campaign contributions." Frank Sorauf, "Politics, Experience, and the First Amendment," 94 Colum. L. Rev. 1348, 1351 n. 17 (1994). Professor Sorauf's writings also conclude that "the demands of the contributor [to a party organization] are largely indirect; certainly, very few contributors seek a direct quid pro quo " Party Politics in America at 339.*

DENY that this is an accurate characterization of Professor Sorauf's opinion as stated in the cited writings;

e.g. Professor Sorauf said that the *Buckley* court did not cite an actual *quid pro quo* but held that the problem was not an illusory one.

60. *The FEC's expert witnesses admit that American parties do not allocate campaign support in return for the agreement of candidates to change their policy positions . Sorauf/Krasno Rpt. at 15-16. Instead, their objective is "to win or maintain control of the [legislative] chamber and the powers of the majority party." Sorauf/Krasno Rpt. at 16, accord Corrado Rpt. at 43; Corrado Dep. at 227-28. Thus, parties allocate their support "for electoral reasons – a chance to win a seat, the danger of losing a seat," rather than to coerce particular policy positions. Sorauf/Krasno Rpt. at 18, accord Corrado Rpt. at 43. Tony Coelho, the former Congressman and Chairman of the Democratic Congressional Campaign Committee stated, "I would never ask somebody to do something that would defeat them. I would never ask somebody to do something that goes against their basic principles." Coelho Dep. at 111-12*

DENY that this is an accurate characterization of Professors Sorauf's and Krasno's opinion which at p. 18 - 19 states that party campaign funds may be used for corrupt purposes. ADMIT that Coehlo stated this in the abstract, but see FEC fact 224 to the contrary in a specific situation.

61. *"Party leaders and public officials are more likely to engage in joint decisions on what level of support is desirable for a given candidacy. Their common ideology and need to win elections should inform party decision making, not pressure on the basis of contributions or assistance given. For the most part, party leaders and public officials are engaged in a joint enterprise seeking common goals." Alexander Rpt. at 22; see also Coelho Dep. at 46 ("You had to have a majority in order to" "elect a Speaker," "decide what Social Security should or should not be," or "decide whether or not there is the American Disabilities Act.").*

The FEC ADMITS that this paragraph is based on the opinion of experts and other witnesses in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports and testimony speak for themselves.

62. *Similarly, every witness who had experience with a political party testified that parties could not and did not use campaign assistance to attempt to control the policy positions of officeholders. Cino Dep. at 118-21; Coelho Dep. at 94-95; Heubusch Dep. at 98-99; Simon Dep. at 20-22; Wirth Dep. at 83; see Bain Dep. at 68-69. To the contrary, incumbents have access to a wide range of funding sources, generally do not receive much, if any, of the party money, and are accordingly not dependent on party funds. See Corrado Dep. at 248.*

DENY. *See* FEC facts 211, 212, 213, 217, 224, 233, 234, 238, 239.

63. *Political scientists have attempted to go beyond anecdote and rumor to assess the influence of money on policy outcomes. "Studies of congressional voting behavior offer no evidence that votes of members of*

Congress or Senators are influenced by party coordinated expenditures or other party contributions. Scholarly research indicates that the factors that generally determine voting behavior are a member's ideological predispositions and the interests of a candidate's political constituency, the voters he or she represents, not the influences of any particular campaign contribution." Corrado Rpt. at 45.

The FEC ADMITS that this paragraph is based on the opinion of Prof. Corrado as qualified. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; but see FEC fact 308.

64. *This is not to say that parties abdicate control of coordinated expenditures and the resulting speech. The FEC's expert witnesses opine that parties "routinely put conditions, often severe and controlling ones" on their "coordinated spending in support of candidates." Sorauf/Krasno Rpt. at 25. However, these conditions relate to achieving the parties' broad goal of assuring election of their candidate, not any attempt to require official action by candidates. See Sorauf/Krasno Rpt. at 25; see also Hickmott Decl. at ¶ 31 ("I am not aware of any instance in which a Senator who had to cast a particularly difficult vote was promised DSCC money in return for that vote."). Furthermore, parties are made up of diverse interests and personalities. As Professor Sorauf notes, "[t]he major American parties are loose coalitions of individuals and groups with quite different interests" where "battles" for control of party resources are common. Money in American Elections at 137.*

DENY that this is an accurate characterization of the opinions of Professors Sorauf and Krasno. See response to fact 62, Sorauf/Krasno Report at 26, Billings Statement at 22-23.

Opportunities For Access And Persuasion

65. *The writings of FEC expert witness Sorauf acknowledge that, in Buckley and subsequent election finance cases, the Supreme Court has "chosen a narrow, literal meaning for corruption," in which the Court repeatedly uses "the phrase 'quid pro quo'" and "clearly was preoccupied with illegal or unethical behavior." 94 Colum. L. Rev. at 1350.*

The FEC ADMITS this is this paragraph is based on the opinion of Prof. Sorauf of a legal conclusion, and therefore, the FEC IS NOT REQUIRED TO ADMIT OR DENY.

66. *The FEC's expert witnesses make no claim that quid pro quo corruption is a focus of concern for purposes of this case. They assert instead that the concept of "corruption" must be "expanded" to include the risk that contributors of "large sums of money" may obtain "access" to candidates and elected officials that gives them "extra opportunities to persuade." Sorauf/Krasno Rpt. at 3-8. Thus, when the FEC's witnesses speak of "corruption," they are using that term in this much watered down sense, never adopted by the Supreme Court, to refer to obtaining such opportunities for access and to persuade. Corrado Dep. at 8.*

The first sentence is a characterization of an unknown person for which no response is required. The FEC ADMITS that the remainder of this paragraph is based on the opinion of experts in this case. In addition the last sentence is the opinion of an expert of a legal conclusion. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports and testimony speak for themselves.

67. *The FEC's experts do not define "large sums" for purposes of their discussion of obtaining opportunities to persuade, nor do they generally distinguish between hard and soft money contributions. The publicly reported controversies to which the FEC experts refer in passing typically involve soft money contributions in the range of hundreds of thousands or even millions of dollars—a range far beyond hard money limits. See, e.g., Sorauf/Krasno Rpt. at 7 n.7 (noting individual that "has given more than $1 million"); id. at 19 (commenting on two occasions where over "$2.5 million from [two different national committees'] non-federal account(s)" were transferred to state candidates); id. at 28 (noting the media's focus in 1996 "on the willingness of interested donors to commit large sums—six-figure sums of soft dollars in some instances").*

This paragraph is a characterization by an unknown person of the opinion of experts and as such no response is necessary.

68. *The FEC's experts concede that "most academic experts" reject claims that access often is "converted into actual policy outcomes," but express their admittedly minority view that additional access may lead to "'some' success, especially on policies concerning narrowly held interests on less visible policy questions" such as a "very specific clause in the tax code applying to very few businesses." Id. at 6-7. They do not explain the mechanism by which access produced the supposed result except to speak of additional "opportunities to persuade." Id. at 6.*

This paragraph is a mischaracterization by an unknown person of the opinion of experts and as such no response is necessary. *See also* FEC facts 161 - 171, 178 - 205, which are contrary.

69. *Access to political party candidates and officeholders may be obtained in various ways, ranging from simply calling to ask for an appointment to serving as a volunteer in political campaigns to attending meetings and rallies. The FEC offers no evidence that persons who are unwilling or unable to make large contributions cannot obtain access in myriad other ways. Rather, the reality is that "many [individuals,] groups and organizations who don't give contributions" still have access to members of Congress and their staffs. Corrado Dep. at 238-39. Professor Corrado, for example, notes that because of his background and area of expertise he has frequent "access." Id. 242-43.*

The FEC ADMITS the first, third and fourth sentences. The second sentence is a characterization by an

unknown person of the evidence in this case and as such no response is necessary.

70. *Donors generally do not give money to attain access to political leaders. "[S]tudies done of donor motivations . . . have found that there's a wide range of reasons why people give. People give because they support the parties. They define themselves as party supporters, and this is one way they politically participate in the process. A substantial share also give because they share the ideological preferences that the parties represent. Others give money because of the fact that they . . . want to be a part of something."* Id. *at 11-12.*

The FEC ADMITS the facts in this paragraph, but notes that it explicitly does not attempt to describe all donors, for examples of other donors see FEC facts 161-210.

71. *Professor Corrado also states that "[a] share of donors . . . give contributions for the purposes of gaining some access. But that doesn't necessarily mean they are seeking specific legislative favors or policy influences." Id. at 12. Instead, many of those seeking access simply "want to meet members of Congress and Senate. . . . [T]hey attach some celebrity status to Members of Congress and members of the Senate. . . . [Finally, m]any of them give for ideological purposes." Id. at 12, 14.*

The FEC ADMITS the facts in this paragraph, but notes that it explicitly does not attempt to describe all donors. For examples of other donors, see FEC facts 161 - 210.

72. *There is no evidence that parties arrange "opportunities to persuade" as quid pro quos for party donors nor has any witness or expert testified that this occurs. Typically, persons who contact parties asking for assistance in arranging a meeting with a legislator are told which staff member to deal with, but the party would not inform the staffer or the legislator of the donor's contributions. See Barbour Dep. at 53-55; Coelho Dep. at 54-57; Wirth Decl. at ¶ 15; Billings Decl. at ¶ 14.*

DENIED. See FEC facts 242, 243, 245-252, 254-281, 303.

73. *The FEC's experts stress that parties arrange for large donors to attend various dinners, receptions, outings, or retreats, also attended by party candidates and officeholders. Sorauf/Krasno Rpt. at 12. They assert that the candidates and officeholders become aware that persons they meet at such events have contributed substantial sums to the party. Id. at 12-13. Even the FEC's experts do not claim that the types of group social events arranged by parties in themselves are useful as "opportunities to persuade."*

The FEC ADMITS the first and second sentences. The second sentence is a characterization by an unknown person of opinion of experts in this case and as such no response is necessary.

Funding Challengers

74. *The FEC's expert witnesses recognize that, but for the constraints imposed by FECA, parties would shift substantial amounts from contributions or indepen-*

dent expenditures to coordinated expenditures on behalf of the party and its candidate. Id. at 44-45. In particular, parties would do so in close contests on behalf of traditionally under-funded non-incumbents where effective communication and "party assistance might make a difference in whether the party candidate wins or loses the election." Corrado Rpt. at 21-22. Parties play a uniquely important role in assisting "challengers who can wage competitive campaigns against an entrenched incumbent of the opposite party." Id. at 22.

The FEC ADMITS that this paragraph is based on the opinion of experts in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the reports and testimony speak for themselves.

75. *"In both parties in 1996, the majority of party coordinated expenditures were made on behalf of non-incumbents . The Democrats devoted 85 percent of their total coordinated expenditures in Senate races to challengers (31 percent) and open seat candidates (54 percent). In House races, 80 percent was spent on behalf of non-incumbents, with challengers (56 percent) receiving more than twice the share that went to open seat candidates (24 percent)." Id. at 23-24.*

ADMIT.

76. *"The Republicans' coordinated activity also favored non-incumbents. The Republican committees, however, spent more than the Democrats defending incumbents because of the unusually large number of incumbents involved in close races, especially among*

the freshman class in the House, most of whom won in 1994 with 55 percent of the vote or less. Even with this unusually large number of threatened incumbents, the Senate and House committees each disbursed close to two-thirds of their coordinated funds on races involving non-incumbents." Id. at 24.

ADMIT.

77. *The witnesses agree, without exception, that the most important factor in determining the extent of party funding of races is the marginality or competitiveness of the race. E.g., Bain Dep. at 31-32; Barbour Dep. at 100, 115; Cino Dep. at 101, 103; Wirth Dep. at 60. Thus, "[i]n [California's] 'close' [state legislative] elections, those where the challenger won at least 40% of the vote, the average contribution in 1988 from party sources was $213,852 to challengers, but only $54,460 to incumbents. Challengers received 30.5% of their funds from party sources, while incumbents received 11.6%." Scully, at ¶ 276.*

The first sentence is a characterization by an unknown person of the evidence in this case and as such no response is necessary. The Commission objects to proffered facts from *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, 1997 WL 7173, at *15 n. 1 (E.D. Cal. Jan. 6, 1998). The Commission was not a party to that suit, and thus has not been given an opportunity to review, challenge or respond to the evidentiary bases on which the findings were made. Furthermore, the Colorado Party has not

submitted the evidence from the *Scully* case to this Court. We also note that *Scully* involved a challenge to a California state law which imposed restrictions on the amount non- federal candidates may raise and spend in their non-federal campaigns. Accordingly, the evidence introduced in *Scully*, and the corresponding findings of fact, do not relate to federal campaigns, federal candidates, federal political committees, or the Colorado Party.

78. *"Party coordinated expenditures are especially important because parties are the only source of funding that mostly benefits non-incumbents. As political scientists have noted for years, one of the major problems in the campaign finance system is the inability of challengers to raise the monies needed to wage viable campaigns." Corrado Rpt. at 25. Challengers "often find it difficult to raise the funds needed to make their views known to the electorate." Id. at 29. "Challengers therefore look to party committees for assistance in overcoming the significant financial disadvantages they experience in most elections. Party money is the only major source of funds in the political system that challengers can rely on to help counter the overwhelming resource advantage incumbents enjoy as a result of their greater success in fundraising [and] the privileges that accompany their position in government, such as the franking privilege." Id. at 26.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Corrado. As opinion, THE FEC IS NOT

REQUIRED TO ADMIT OR DENY; the report speaks for itself.

79. *By contrast, "[p]arty resources are not a major source of funding for incumbents." Id. at 22. As a general rule, incumbents have an established campaign organization, campaign experience, name recognition, and credibility in raising funds directly, advantages that most challengers lack. Id. at 26. Access to PAC money alone strongly favors incumbents. "[I]n 1996 PACs gave an average of over $950,000 to Senate incumbents, more than three times the average amount they gave Senate challengers." Id. Similarly, in 1996 "PACs gave an average of close to $300,000 to House incumbents, which was more than five times the amount given to challengers and approximately five times more than the amount that national and state parties combined were legally allowed to spend ($61,820) on behalf of such challengers." Id. at 26-27. "In many instances, parties would be willing to spend more to assist their candidates, but are prevented from doing so because of [the] federal ceilings [at issue in this case]." Id. at 27. Accordingly, "[i]n addition to spending disproportionately on marginal, competitive races, the parties time their spending to assure its strategic value." Money in American Elections 141.*

The FEC ADMITS the first five sentences in this paragraph, but notes that these are explicitly generalized facts that may not be accurate for all candidates. The last two sentences are opinions, which the FEC IS NOT REQUIRED TO ADMIT OR DENY.

80. *One of FEC expert Sorauf's books documents the lack of funding for challengers: "What was a 1.5 to 1 advantage over their challengers in receipts in 1978 became a 3.7 to 1 spread by 1990." Frank Sorauf, Inside Campaign Finance 16 (1992). "In 1980 the average House major-party challenger running against an incumbent in the general election spent $100,458 in the entire campaign; by 1990 that figure was only $109,377, and only $54,503 in 1980 dollars. The average incumbent spent $165,599 in 1980 and $399,310 in 1990 ($199,197 in 1980 dollars)." Id. at 174. In addition to this funding advantage, incumbents' "advantages of office," including the "postal frank, their easy access to the media, their district offices, and their staffs for 'servicing' constituents, all have grown in recent decades." Id. at 176. Parties can potentially present a partial counterbalance for the challenger. See Billings Decl. at ¶ 18. Professor Sorauf notes that, in contrast to other election funding sources, parties tend to direct their support to nonincumbents. Money in American Elections 141. Accordingly, "to the extent [that] you limit the role of the party, you basically are protecting the good old boy network, as opposed to reaching out [to challengers]." Coelho Dep. at 117.*

The FEC ADMITS the amounts described, but the remainder of sentences one through four and sentence six are based on the opinion of Prof. Sorauf. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself. [book] To the extent this paragraph restates facts supported by Prof. Sorauf's book, the FEC ADMITS. The FEC DENIES that

sentence five accurately characterizes Billings statement. The FEC ADMITS that sentences six and seven are based on the opinions of witnesses in this case. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the testimony and declarations speak for themselves.

There Is No Evidence Justifying the Present Low Limits

81. *In addition to contending that FECA forbids any limitation on a party's coordinated spending of hard money in support of its candidates, the Party alternatively contends that the limits imposed by FECA are unconstitutionally low. The FEC has offered no evidence justifying the present FECA limits or showing that much higher limits would not fully serve any legitimate governmental purpose. Instead, the FEC witnesses have offered only the speculative consequences of allowing completely unlimited coordinated spending by parties.*

This paragraph is legal description of the Colorado Party's position in this matter and the characterizations of the evidence by an unknown person, none of which require a response.

82. *"[T]he current 441a(d) limits are very severe restrictions on the party's ability to work with their candidates." Corrado Dep. at 275. These limits "were not designed to ensure effective or meaningful political communication. They were set at levels—2 cents times the voting-age population with adjustments for infla-*

tion—that virtually guaranteed that any communication with party members on behalf of candidates would be severely limited. At this level of funding, party committees could not afford to pay the postage on one letter to each eligible voter in a district or state, never mind the cost of the stationary and printing needed to produce the letter. In fact, the limits were so low that a party committee could not even send a letter to each party supporter in a state or district; that is, it could not pay to send a letter to its own members. In contrast, congressional incumbents in 1974 were spending $30.5 million posting franked mail to constituents at an average cost of about 10 cents per piece of mail. By 1988, congressional incumbents were spending about $82.2 million on franked mail, at an average mailing expense of about 14 cents. The coordinated spending allowed party organizations, however, had increased only to about 5 cents for each person of voting age." Corrado Rpt. at 17

The FEC ADMITS the amounts cited, but the remainder of this paragraph is based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

83. *"The coordinated spending limits are particularly restrictive because they are adjusted only for inflation and voting age population. Neither of these measures adequately represents the real changes in the costs of campaigns. The costs of campaign services and communications, such as polling, television advertising, direct mail services, and travel expenses, have increased at a rate significantly greater than the Consumer Price Index, which is used to adjust party*

spending limits." Id. at 17-18 (explaining that while the Consumer Price Index rose "about 40 percent," "the cost of such basic items as mass mailings, television commercials, and air travel grew by 50, 100, and 300 percent"); see also Scully, at ¶ 129 ("Since 1976, the cost of campaigns has risen and the value of the dollar has decreased.").

The FEC ADMITS that this paragraph is based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself. To the extent this paragraph restates facts supported by Prof. Corrado's statement, the FEC ADMITS. The Commission objects to proffered facts from *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, 1997 WL 7173, at *15 n. 1 (E.D. Cal. Jan. 6, 1998). The Commission was not a party to that suit, and thus has not been given an opportunity to review, challenge or respond to the evidentiary bases on which the findings were made. Furthermore, the Colorado Party has not submitted the evidence from the *Scully* case to this Court. We also note that *Scully* involved a challenge to a California state law which imposed restrictions on the amount non-federal candidates may raise and spend in their non-federal campaigns. Accordingly, the evidence introduced in *Scully*, and the corresponding findings of fact, do not relate to federal campaigns, federal can-

didates, federal political committees, or the Colorado Party.

84. *"There is a minimum funding threshold in competitive races that a challenger who does not otherwise have name recognition must reach in order to compete in a campaign."* Scully, *at ¶ 124. "[W]e have already reached a point where . . . the parties . . . just cannot provide much assistance, particularly to these challengers who often need much more help in terms of getting over that hump of waging a viable campaign." Corrado Dep. at 278 (noting that while campaign spending in a hotly contested congressional race ranges between $500,000 to $950,000, the party may find itself limited to spending only about $30,000 in coordinated expenditures).*

The Commission objects to proffered facts from *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, 1997 WL 7173, at *15 n. 1 (E.D. Cal. Jan. 6, 1998). The Commission was not a party to that suit, and thus has not been given an opportunity to review, challenge or respond to the evidentiary bases on which the findings were made. Furthermore, the Colorado Party has not submitted the evidence from the *Scully* case to this Court. We also note that *Scully* involved a challenge to a California state law which imposed restrictions on the amount non-federal candidates may raise and spend in their non-federal campaigns. Accordingly, the evidence

introduced in *Scully*, and the corresponding findings of fact, do not relate to federal campaigns, federal candidates, federal political committees, or the Colorado Party. The FEC ADMITS the amounts in sentences two and three, but the remainder of those sentences are based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report and testimony speak for themselves.

85. *These restrictions on coordinated spending "make it impossible for [political] committees to pay for a very extensive or intensive amount of campaign speech." Corrado Rpt. at 33.*

The FEC ADMITS that this paragraph is based on the opinion of Prof. Corrado. As opinion, the FEC IS NOT REQUIRED TO ADMIT OR DENY; the report speaks for itself.

86. *For example, "even if a party takes advantage of bulk mail and reduced postal rates, and spends the maximum amount allowed the national and state and local committees in a given congressional district, the party can at best pay the postage for one mailing to a targeted group of voters within a district. It is not allowed to pay the production expenses and mailing of just one letter to the voters within a district."* Id.

The FEC ADMITS that this paragraph as explained and qualified by Professor Corrado.

87. *"Political mailings such as material from a candidate compete not only with one another for the recipients' attention but also with the approximately 22 pieces of commercial mailings or "junk mail" that households in California receive each week. In these circumstances, repetition is essential if the candidate's message is going to be received and heard through what amounts to the noise of other mail. Without repetition, it is as if the communication did not happen. It takes five mailings to establish a meaningful mail campaign."* Scully, *at ¶¶ 83-84.*

The Commission objects to proffered facts from *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, 1997 WL 7173, at *15 n. 1 (E.D. Cal. Jan. 6, 1998). The Commission was not a party to that suit, and thus has not been given an opportunity to review, challenge or respond to the evidentiary bases on which the findings were made. Furthermore, the Colorado Party has not submitted the evidence from the *Scully* case to this Court. We also note that *Scully* involved a challenge to a California state law which imposed restrictions on the amount non-federal candidates may raise and spend in their non-federal campaigns. Accordingly, the evidence introduced in *Scully*, and the corresponding findings of fact, do not relate to federal campaigns, federal candidates, federal political committees, or the Colorado Party.

88. *Political parties are similarly unable to coordinate with candidates to "finance a significant amount of media broadcast time. Generally the § 441a(d) limits prevent the parties from purchasing the broadcast time needed to air more than one or two ads effectively on a statewide basis. For example, in 1996, the national party organizations were permitted to spend $168,707 in South Carolina under the § 441a(d) ceiling. The estimated cost to air one thirty-second campaign ad in South Carolina on a statewide basis with enough frequency that it would penetrate the viewing audience and have its message understood by voters was approximately $186,000." Corrado Rpt. at 33. The comparable figures in Colorado would be costs of "$123,750 against a limit of $170,932."* Id. *One or even two thirty-second campaign ads are inadequate however as, for example, "[i]t requires a thousand rating points, which mean approximately ten repetitions, on television to communicate a message in a statewide campaign in California."* Scully, *at ¶ 102.*

The FEC ADMITS the facts cited by Professor Corrado. The Commission objects to proffered facts from *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, 1997 WL 7173, at *15 n. 1 (E.D. Cal. Jan. 6, 1998). The Commission was not a party to that suit, and thus has not been given an opportunity to review, challenge or respond to the evidentiary bases on which the findings were made. Furthermore, the Colorado Party has not submitted the evidence from the *Scully* case to this Court. We also

note that *Scully* involved a challenge to a California state law which imposed restrictions on the amount non-federal candidates may raise and spend in their non-federal campaigns. Accordingly, the evidence introduced in *Scully*, and the corresponding findings of fact, do not relate to federal campaigns, federal candidates, federal political committees, or the Colorado Party.

Respectfully submitted,

/s/ LAWRENCE M. NOBLE (SEH)
LAWRENCE M. NOBLE
General Counsel

/s/ RICHARD BADER (SEH)
RICHARD B. BADER
Associate General Counsel

/s/ STEPHEN E. HERSHKOWITZ
STEPHEN E. HERSHKOWITZ
Assistant General Counsel

/s/ SUSAN E. PROPPER
SUSAN E. PROPPER
Assistant General Counsel

/s/ COLLEEN T. SEALANDER
COLLEEN T. SEALANDER
Attorney

February 13, 1998

FOR THE COUNTER-DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 219-3690

Excerpts from exhibits in support of Federal Election Commission's motion for summary judgment

THE CONGRESSIONAL FORUM AND HOUSE COUNCIL

PROGRAMS OF THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE

The Congressional Forum and House Council programs of the National Republican Congressional Committee have been developed to open the channels of communication between the business community, PACs, and Republican House Members. The programs involve its participants in the policy-making process through an unprecedented level of dialogue with House Republicans and party leaders.

These programs offer an unprecedented number of quality events which allow you to develop important relationships not only with Republican Members of Congress, but also with others in the business community. Regular meetings permit Congressional Forum and House Council members to voice their opinions and exchange information regarding the issues directly affecting their industry.

THE CONGRESSIONAL FORUM

$15,000 Annually for Individuals and PACs
$20,000 Annually for Corporations

The Congressional forum is the NRCC's major donor program for the business community. This program has been designed to give its members an intimate setting to develop stronger working relationships with the new Republican Congressional majority. Members of the Congressional Forum

receive all the benefits of the House Council program in addition to Congressional Forum benefits.

BENEFITS OF MEMBERSHIP:

- Monthly private dinners with the Chairmen and Republican Members of key Congressional Committees.
- Private dinner with Speaker Newt Gingrich and the GOP House Leadership.
- Private dinner with House Committee Chairmen.
- An invitation to the Chairman's Skeet and Trap Shoot.
- VIP Preference at House Council and NRCC events.

The most important thing you can do to support Republicans is to support the NRCC. *Membership dues go directly to fund House races.*

THE HOUSE COUNCIL

$5,000 Annually for Individuals and PACs
$10,000 Annually for Corporations

The House Council is the NRCC's lower-dollar donor program for the business community. The program strives to open the lines of communication between Republican Members of Congress, key-staff, and the business and PAC community. Through its briefings and events this program provides an unprecedented level of dialogue and information for its members.

BENEFITS OF MEMBERSHIP:

- Regular briefings with key Republican Members and staff who work directly on the discussion topic. This year's topics will include *Contract with America* legislation, welfare reform, Superfund, regulatory reform, as well as topical issues as they come before Congress.
- Regular Political Briefings focusing on national trends and activities crucial to maintaining Republican control of the House in 1996.
- Invitations to the NRCC Winter and Summer Meetings, each two-day event features political and legislative discussions with key House Members and keynote addresses by prominent GOP leaders.

FOR FURTHER INFORMATION, PLEASE CONTACT NYDIA BONNIN, CONGRESSIONAL FORUM/ HOUSE COUNCIL DIRECTOR, AT (202) 479-7011.

Paid for by the National Republican Congresssional Committee. Not prepared at government expense.

National Republican Senatorial Committee

CHAIRMAN'S FOUNDATION NEWS
NATIONAL REPUBLICAN SENATORIAL COMMITTEE

Senator Al D'Amato
Chairman

September 27, 1995

FOUNDATION MEETING NOTES

The Chairman's Foundation held its 4th meeting of 1995 on Tuesday, September 12th at NRSC Headquarters on Capitol Hill.

Thirty Foundation members and guests were briefed on the issues before the Senate Finance Committee by the Chief of Staff and General Counsel, the International Trade Counsel and the Tax Counsel. Following the briefings, Foundation members had the opportunity for in-depth, personal discussions on the issues during a reception and working dinner with Senators D'Amato, Bond, Simpson, Chafee, Murkowski, Pressler, Grassley and Nickles, as well as the new Finance Committee Chairman, Senator Roth, and the Finance Committee staffers. We were very pleased to have fully eight of the ten Republican Senators on the Finance Committee in attendance, with Senator Roth in only his second day in the chairmanship.

We would like to answer questions or listen to any ideas you might have regarding the above items or the

Chairman's Foundation in general. Please call Nancy Thawley at 202/675-6102 or Dennis Ryan at 202/675-6005.

RONALD REAGAN REPUBLICAN CENTER
425 SECOND STREET NE • WASHINGTON DC 20002 •
(202) 675-6000

LEGACY OF LEADERSHIP

■ CITIZEN LEADERS DEDICATED TO AMERICA'S FUTURE: The Presidential Roundtable is a unique forum in U.S. politics which brings together many of the nation's most informed business leaders and prominent citizens who want to help strengthen our economy and protect American liberty. Roundtable members support these goals through their generous financial support for Republican Senatorial campaigns and through their personal contact with individual Republican Senators. Today, with a Republican Majority Congress, there are even greater opportunities for Roundtable members to advise and counsel Republican Senate leaders on legislation to roll back government and restore America's greatness.

■ MEMBERSHIP BY INVITATION: The membership of the Roundtable is limited and by invitation only. Typically, meetings take place in small working groups or panel discussions allowing members more direct discussions with Republican Senators on critical social, political and economic issues.

■ SEIZE THE CHALLENGE: Presidential Roundtable members have a special focus on the policies of the presidency and electing a Republican to the White House in 1996. Important membership benefits include up-to-the-minute strategy sessions with Republican candidates and campaign managers on winning the presidency. Members are highly regarded as serving among the top echelon of leaders who are at work to make certain America will enjoy the full benefits of Republican leadership in the White House.

■ A PERSONAL COMMITMENT: Expanding the 53 seat Republican Senate Majority in 1996 is another important goal of the Presidential Roundtable. Roundtable members will be the senior partners in providing the financial resources and expert campaign assistance Republican Senators and candidates need to defeat their Democrat opponents.

■ ROUNDTABLE POLICY FORUMS: In addition to specially arranged events in different parts of the country, members come to Washington twice a year to attend Roundtable Policy Forums, a members-only, private meeting with Republican Senators and distinguished guests. The sessions are attended by the Republican Chairmen of such key Senate Committees as Finance, Appropriations, Foreign Relations and Judiciary, as well as by other Republican Senators and select leaders from the national and international political and business world. During Republican Administrations, member meetings and receptions with the president, vice president and cabinet officials are not uncommon.

■ REPUBLICAN NATIONAL CONVENTION: As an additional membership benefit, Presidential Roundtable members will have the opportunity to attend the August 1996 GOP Convention in San Diego, California.

■ PERSONAL MEMBERSHIP BENEFIT: Roundtable members are entitled to attend all events of the Republican Senatorial Inner Circle. Additionaliy, members receive a special quarterly campaign and legislative publication, *Roundtable Forum*, as well as the distinctive Presidential Roundtable lapel pin and membership card. An added member benefit is to make new

business and personal friendships through Roundtable events.

■ ROUNDTABLE STAFF: Members are encouraged to contact the Roundtable staff, through a special toll-free number, for information on upcoming Roundtable events, or for any assistance they might need in planning their visits to Washington.

■ FINANCIAL COMMITMENT: Roundtable membership requires a generous annual financial membership of $5,000 in personal or corporate funds to the National Republican Senatorial Committee (NRSC).

■ YOU ARE INVITED: Those with the vision and resources are invited to seize the challenge to make history by winning an across-the-board victory in 1996 as a member of the Presidential Roundtable.

National Republican Senatorial Committee
Ronald Reagan Republican Center
425 Second Street, N.E.
Washington, DC 20002
(202) 675-6095

Congressman Wayne Allard

August 27, 1996

Collis P. Chandler Jr.
2101 Ridge Plaza
Castle Rock, CO 80104

Dear Collis:

Thank you! Because of the early commitment you and others made, I am the Republican Party's nominee to succeed Hank Brown in the United States Senate, and am working now for a solid victory in November.

It will be a tough fight, though, and the Democrats will do everything to take this seat away as part of their quest to take over the Senate and return to "business as usual" as they enjoyed it previously. I am pleased that Colorado GOP Chairman Don Bain has assured me the Party is 100 percent behind our campaign, and that support will be critical.

I would like to invite you to join Joan, Don and me for a breakfast briefing on this and other important general election races. Don and others will give the latest data and strategic insights on the campaigns, from the White House to the Colorado General Assembly. Breakfast will be on Monday, September 9, 1996 at The Brown Palace at 7:30 a.m.

We hope you will be able to attend this briefing session. Your financial support to my campaign has been vital, and you have our deepest gratitude. Under federal election laws, however, you are at the limit of what you can directly contribute to my campaign. At

the breakfast, Don and I will also discuss how you can further help my campaign by assisting the Colorado Republican Party. As I mentioned, the Colorado GOP will play an enormous role for me and other candidates in the general election race. I encourage you to come and join in this important discussion.

Please R.S.V.P. for this briefing breakfast to Mary Kay Bohnenblust at (303) 893-1776 by Friday, September 6. I am looking forward to seeing you there, and Joan and I thank you once again for your help and support.

With warm personal regards,

Wayne Allard

Paid for by the Colorado Republican Party

TO: Rep. Bill Paxon
Maria Cino

FROM: Gary A. Franks

DATE: July 22, 1996

RE: NRCC Support

I am anticipating a very tough re-election. I have been attacked by the unions with negative television commercials, on and off, since the summer of 1995.

The Democractic National Committee (led by Connecticut Senator Chris Dodd) is committed to defeating me.

I am requesting and I need the full financial support of the NRCC.

It should be noted that I have raised the NRCC $25,000 via the House-Senate Dinner this year and I raised $25,000 in 1995 for the RNC.

Your immediate consideration and approval would be appreciated.

Thank you.

/s/ Gary A. Franks

AMERICAN INVESTMENT MANAGEMENT, INC.

P.O. Box 220 - 1110 Bradshaw Drive
Florence, Alabama 35631-0220
VIA FACSIMILE To:

Phone (205) 760-9657
Fax (205) 767-5804

RE: $ Contribution to Alabama State Republican Party on behalf of U.S. Representative Bill Archer and Wayne Parker

DATE: September 24, 1996

PAGES: Cover + 1

As I have discussed with each of you, I have been asked by Herb Collins to assist in raising funds that U.S. Representative Bill Archer (R) Texas will be giving to the Alabama State Republican Party Presumably these funds will be used by the State Party to help in the election of Wayne Parker (Bill Archer's son in law) in his bid to unseat U.S. Representative Bud Cramer. I have been asked to send our checks directly to Bill Archer at his home in Virginia.

We are trying to accomplish this as quickly as possible so please send to me by Friday of this week your contributions so that I can forward them to Mr. Archer. The checks should be made out to: Alabama State Republican Party, no corporate checks.

Thanks for your help. I believe this to be a very worthy cause in our fight to convince Representative Archer to stop his efforts to Sunset the Tax Credits. If you have any questions, please call me.

Sincerely,

/s/ ALLAN RAPPUHN
ALLAN RAPPUHN

MOBILE TELECOMMUNICATION TECHNOLOGIES
SECURITY CENTRE SOUTH, SUITE 900
JACKSON, MISSISSIPPI 08901

John N. Palmer
Chairman of the Board

July 10, 1996

[REDACTED]

Dear

I had called you several weeks ago to ask you to join the Team 100 committee of the Republican Party.

I feel we have a rare opportunity with Haley, Trent and Thad in the positions they are today.

Ed Lupberger, CEO of Entargy, joined Team 100 earlier this year, and this past Spring I saw Haley escort him on four appointments that turned out to be very significant in the legislation affecting public utility holding companies. In fact, it made Ed a hero in his industry.

If you have been considering this or if there is a chance you might, I feel it significant to Haley and the Senators if you could do this. Besides it would be a lot of fun having you at some of these meetings. Thank you for your considerations. I look forward to seeing you on the tennis courts.

Best personal regards,

/s/ JOHN PALMER
JOHN N. PALMER

NEW
YORK
LIFE

September 17, 1997

New York Life Insurance
Company 51 Madison
Avenue, New York, NY
212 576-7750

Lee M. Cammilt, Jr. CLU
Vice Chairman

Mr. Haley Barbour
Chairman
Republican National Committee
310 First Street, SE
Washington, DC 20003

Dear Haley,

As a Team 100 member, I am seeking your help in sharing our grave concerns with Republican leadership regarding the Senate's federal mental health parity mandate (attached to the VA/HUD appropriations bill). We at New York Life are opposed to this provision which will not increase mental health coverage and will decrease affordability of health care in general.

Republicans successfully foug.. President Clinton's 1993 health care reform proposal which contained numerous federally mandated requirements and benefits. Now these mandates are being considered piecemeal. I am hopeful that a Republican-controlled Congress will once again fight these proposals and resist the urge to let government determine what health benefits an employer should offer to its employees.

We support coverage of mental health benefits. However, mandating mental health parity will not increase coverage of mental health benefits. In Senator Domenici's amendment, mental health parity is only required if any type of mental health benefit is offered. Because of the cost, it is very probable that mental health benefits will be dropped entirely from plans, with the result that mental health coverage is less frequently available. Those plans that do offer mental health coverage will be vulnerable to adverse selection, creating an upward premium trend for those plans.

This mandate has not been properly considered through the Congressional legislative process. No hearings have been held in the House or Senate. Committees of jurisdiction have not had time to review the practical effects of this provision, markup legislation, and consider amendments. This mandate is not well developed as was the recent Health Insurance Reform legislation which matured over several years. It would be a severe mistake to pass this mandate at this time.

We will be calling you to discuss this. In additional, a letter from the Citizens for a Sound Economy and an article from *Investors Business Daily* are enclosed for your reference. Please call me or Mary Moore Hamrick at 202-783-1354 if you have any questions.

Sincerely,

/s/ LEE

Enclosures

DECLARATION OF HERBERT E. ALEXANDER, Ph. D

This report provides you with the information that you have requested regarding my opinions related to the case of *Colorado Republican Federal Campaign Committee and Douglas Jones, as Treasurer, v. Federal Election Commission.* It also summarized my qualifications, and it provides you with information about my publications and one recent case in which I have rendered an expert opinion.

PERSONAL BACKGROUND

I am currently the director of the Citizens' Research Foundation at the University of Southern California. I have held that position since 1958. CFR is devoted to bringing new awareness and understanding to the problems of political finance. It has pioneered the study of money in the political process: where it comes from, how it is handled and spent, and how it affects our democratic processes. It serves as a non –partisan observer and interpreter of trends in political finance and election reform, and it undertakes research, studies, seminars and publications to those ends. It also serves as an information clearinghouse for scholars, the media, and policymakers.

In addition to serving as director of CRF, I am professor of political science at USC. As reflected in my curriculum vitae, a copy of which is attached as Exhibit A, my expertise lies in the area of political finance. I have studied, written, and taught on issues related to political finance for more than thirty years, and I have been recognized as one of the leading experts in the field. I have served on several commissions (including the President's Commission on

Campaign Costs, 1961-62), task forces, and panels related to campaign finance, and I have acted as a consultant for numerous public agencies, private organizations and media entities. I have written, co-authored or edited more than twenty books and 200 articles on matters relating to money in politics, its uses and regulation.

Throughout my professional life as a political scientist, I have advocated strengthening of American political parties. I have written on the impact of the Federal Election Campaign Act on the parties, and I have testified before the Congress and state bodies that stronger political parties are an essential element in campaign finance reform. My graduate education began just following the publication of the classic *Toward a More Responsive Two-Party System*, a Report of the Committee on Political Parties of the American Political Science Association (1950).[1] That volume influenced my thinking about political parties, and while the years since have raised questions about some of the findings and recommendations, the thrust to develop a stronger two-party system has remained a professional life-long belief and interest.

Since 1982, when I was instrumental in establishing the Committee for Party Renewal, Southern California, I have actively sought that goal, and I chaired two major conferences on the subject. I also participated in the Brief Amicus Curiae of the National Committee for Party Renewal submitted on writ of certiorari to the

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[1] Toward a More Responsive Two-party System: A Report of the Committee on Political Parties, American Political Science Association, Supplement Vol. XLIV, Number 3, Part 2, September 1950.

US Court of Appeals for the Tenth Circuit in the present case.

MODERN CAMPAIGN FINANCE REFORM

Few would argue that many of the political reforms that were set in motion more than half a century ago were no healthy for the American body politic. In retrospect, however, some of those reforms caused new problems. For example, in the interest of taking the selection of candidates out of the hands of political party bosses, the system of primary elections was inaugurated. That system today has swollen to gigantic proportions—primary costs are high, candidates are numerous, voter turnout is low, the parties are weaker because their nomination function has been lost-and primaries are far from being the kinds of referenda that reformers in the early 20th century envisioned.

Like the earlier political reforms, those of the early 1970s relating to political finance have brought both intended and unintended results. The wave of reform in the early 1970s was fundamentally an effort to improve a system perceived by many as fraught with favoritism and corruption. Many observers felt the American system of financing elections through often unlimited private donations gave undue influence in politics and government to wealthy or well-organized donors at the expense of the un-wealthy, the unorganized and the general public. Indeed, the system did have its share of secret money, unreported money, extorted money, corporate money, laundered money, foreign money, even tax-free money. The political financing reforms of the early 1970s sought to relocate political power, to reduce the perceived influence and power of monied interests and to extend and expand

citizen participation in the governing process. It is ironic that currently, more than twenty years later, similar criticisms are being made and many of the proposed remedies are only stricter or extended forms of the same regulatory schemes that have failed to stem the tide of money.

It is important to note at the outset that it costs money to run a campaign, and campaigns have become increasingly expensive. The days when candidates kissed babies, marched in torchlight parades and passed out sponges with their names that expanded when dunked in water are long gone. The modern campaign has become very professionalized. It is not uncommon for candidates to use the services of pollsters, advertising specialists, direct mail consultants, fund raisers, and with the complexities of laws, election lawyers and political accountants. These services cost money. The costs of new technologies, radio in the 1920s, television in the 1950s, and now cyberspace, have increased the expense of running an effective campaign. We are 150 years past the time when a candidate could simply purchase a printing press and start his or her newspaper as a platform.

Too little money in the campaign process can be extremely harmful. It takes money to gain name recognition and convey a candidate's views.[2] This is particularly true for candidates that are challenging incumbents who enjoy existing name recognition and a variety of perquisites of office. Elections are improved by well-financed candidates able to wage competitive

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[2] I served as an expert witness on these matters in National Black Police Association, et al. v. District of Columbia Board of Elections and Ethics, et al.

campaigns, not by stifling political dialogue. Money is needed to amplify free speech so it can be heard by the electorate. Candidates need to convey their records, qualifications and programs in their own words, not as mediated by the media.

While there are many voices today calling for lowered campaign costs and a level playing field, the fact remains that there are many sources of funding willing to contribute to candidates, political action committees and political party committees, and to spend money directly on independent expenditures, issue advertising, soft money and self-financed candidacy. A major difficulty is that some political activities are outside the scope of the FECA, and therefore, significantly, are not accountable. When campaign funds are raised and spent by political parties coordinating their activities with candidates, the ballot provides accountability: candidates can be voted out of office and political parties can be voted out of control.

Money is not the sole campaign resource, but it is convertible into many of the resources candidates need to mount effective campaigns: professional staff, mass media advertising and sophisticated campaign technologies. Money may not win elections—the candidate who spends the most is not always victorious—but a strong case may be made that an essential element of modern campaigns is adequate financing.

One unintended result of campaign reforms has been to reinforce the splintering tendencies in our political process by limiting the roles political parties can play. Public funding directly to candidates has served to diminish the influence of the political parties because it helped free each candidate's personal organ-

ization from the party hierarchy. An increase in the number of state presidential primaries and changes in election and party rules continued a process begun after 1968, through which the national party organizations found their control of the choice of their nominees significantly reduced. The politicians, the parties, and the plutocrats were replaced by the primaries, the press, and the polls, while special interests took new forms

Reform is not neutral. It works to change institutions and processes, sometimes in unforeseen ways. Election laws are used as instruments to achieve political goals. Laws that regulate relationships between candidates and political parties, and between citizens and politicians, and that affect the relative power of interest groups and political parties, are bound to influence the entire political process and change the way in which citizens, candidates, parties and other groups participate and interact in elections.

In every society in which free elections have been held, the problem of who pays the political bills and why has arisen. The problem is to reconcile a theory of democratic government with a set of economic conditions—how to hold to the egalitarian assumption of "one person, one vote" in the face of the reality that in our democracy there is an unequal distribution of economic resources.

The problem of election reform in this unique set of circumstances may be stated in this way: how do we improve political dialogue, attract a more attentive and well-informed electorarte, encourage citizens to participate in the political process as workers, contributors and voters, yet diminish financial inequalities among

candidates and political parties and reduce the dominance of big money while opening opportunities for well-qualified persons to become candidates? How do we apply democratic principles to elections in an age of media politics, seemingly dominated by an atmosphere of dollar politics, in ways consonant with constitutional guarantees. The electoral process is a classic case of conflict between the democratic theory of full public dialogue in free elections and the conditions of an economic marketplace.

Money, after all, is symbolic. The deeper competition is for power or prestige or other values. In this sense, money is instrumental. Its importance is in the ways in which it is used by people to try to gain influence, or is converted into other resources, or used in combination with other resources, to achieve political power.

But power is distributed unequally in society; it does not vary directly with wealth, status, skill, or any other single characteristic. Rather, degree of power is determined by many such factors, no one of which stands alone. And none of which has meaning unless related to the purposes of the individual and the environment in which one acts. So money is but one element in the equation of political power. But is the common denominator in the shaping of many of the factors comprising political power because it buys what is not or cannot be volunteered. Giving money permits numbers of citizens to share energy that must go into politics. Especially in affluent America, surely many individuals find it easier to show their support for a candidate or their loyalty to a party by writing a check than by devoting time to campaign or political work. Of

course, most citizens have no special talent for politics or will not give the time. So money is a substitute and at the same time a meaningful way to participate. If money is considered as a substitute for service, somehow it does not require a firm a commitment: one might give money to both parties but is much less likely to give time to both. Money has an advantage over service, however, in that it is not loaded down with the idiosyncrasies of the giver.

The new technologies and the professionalization of politics, which were brought on in party by the laws, are having important consequences for voluntarism by requiring serious candidates to substitute paid experts for free, usually unskilled help. Corporations and labor unions can use treasury money, assigning paid workers to cope with regulation and passing along the cost in higher prices or increased dues. Because money is a scarce resource in politics, candidates, parties and political committees cannot as readily pay salaries to ensure compliance and cannot pass along the cost. When they do allocate money resources to compliance, their campaigning capability is reduced and financial pressures on them increase. Hence it is desirable to keep regulation to a minimum.

THE IMPORTACT OF PARTIES

Today, there are more definable groups than ever before seeking attention—business, labor, professional, public-interest-and each has its subgroups dealing with a specific industry or issue. Larger grouping are fragmented, so the voices heard most effectively are those with large resources or those achieving dramatic appeal. Pluralism may be more extensive than ever but what it heard is a vast clamor. The fragmentation is

evident in independent voting, and few broadly-based groups can deliver voters who have diverse interests. Indeed, this situation is a partial cause of current public dissatisfaction, and prompts the need for restructured and improved political parties. But to accomplish this goal, parties need to be as free of legal restraints as is possible. No force other than political parties can produce coherent majorities working in the public interest. There is need for new incentives to encourage citizen participation in the electoral process through the parties, and an open environment in which public policy alternatives can be debated fully and freely within the context of a vibrant tow-party system.

This line of reasoning suggests that it is desirable to give incentive for as much political activity as possible to be directed into regulated and disclosed channels, through candidates and parties particularly. In this regard, the roles of political parties are crucial, as regulated and disclosed channels of political activity, accountable to the electorate in the next election.

Most political scientists believe that political parties play an essential role in developing, maintaining, and securing a strong and effective democracy in the United States. The late professor Clinton Rossiter, in *Parties and Politics in America*, wrote: "there is no America without democracy, no democracy without politics, and no politics without parties.[3] Another eminent political

[3] Clinton Rossiter, *Parties and Politics in America* (Ithaca: Cornell University Press, 1960), p. 1.

scientist, Walter Dean Burnham, of the University of Texas, has written:[4]

> To state the matter with utmost simplicity: political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually-or organizationally-powerful.

Political parties have been defined in various ways. Edmund Burke, in "Thoughts on the Cause of the Present Discontents" wrote that "Party is a body of men united, for promoting by their joint endeavors the national interest, upon some particular principle in which they are all agreed."[5] A much more modern definition would hold that a party is ". . . any group, however loosely organized, seeking to elect governmental office-holders under a given label.[6]

American political parties are among the oldest in the world, but their power has waned in the last half century. Historically, the parties suffered when civil service and professionalization replaced patronage; when primaries took candidate selection out of their

[4] Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: W.W. Norton & Company, Inc., 1970). p. 133.

[5] Edmund Burke, "Thoughts on the Cause of the Present Discontents," in Paul Langford, editor, *The Writing and Speeches of Edmund Burke*, Vol. II, Party, Parliament, and the American Crisis (New York: The Oxford University Press, 1981), p. 317.

[6] Leon D. Epstein, *Political Parties in Western Democracies* (New Drunswick, N.J.: Transaction Books, 1979), p. 9.

hands; when government began to provide social services the urban party organizations used to attract the allegiance of voters; when television focused dramatically on the candidate independent of his or her party; when immigration declined, the movement to the suburbs accelerated, and urban party organizations lost some of their support and reasons for being; when education led to the ethic to vote for the "better person", however perceived, leading in increased ticket-splitting. American politics has become excessively candidate-oriented and the parties may operate parallel campaigns of their own, or even better, work with their candidates in joint campaigns. Now one of the last remaining ties between the party and the candidate-money-has been restricted or provided by government directly to some candidates, thus reinforcing the splintering and fragmenting tendencies already present in our candidate-centered culture.

Party decline has led one political scientist, James David Barber, of Duke University to suggest that "[t]he media in the United States are the new political parties."[7]

Political parties have adjusted to the advent of modern technology, professional campaign consultants, and candidate-centered campaigns by developing financial, technical and organizational resources of their own, enabling them to play significant roles in present-day campaigns. Parties are a multi-layered phenomenon, involving many different kinds of

[7] Quoted by Gary R. Orren, "Thinking About the Press and the Government," in Martin Lipsky, editor, *Impact: How the Press Affects Federal Policymaking* (New York: W.W. Norton, Inc., 1986), p. 10.

organizations and activities under a common name and reflecting our federal system with party committees and candidates at the national, state and local levels of political activity. They also have sought to centralize and unify campaigns by working to achieve wider cooperation with party committees and candidates at the national, state and local levels of political activity. And they have sought to advance party building as an essential element of competition in the electoral arena.

Political parties participate in political socialization by transmitting values and information. They contribute to the accumulation of political power by aggregating masses of individuals and groups, enabling the party to govern. They dominate the recruitment of elected officials and political leadership, even though they have lost control of the nominating process of primaries and caucuses. Nevertheless, parties are a force for unification in a divided American political system. Parties system. Parties bring coherence while simplifying electoral choice.

Political parties are institutions that animate the political process. They are an integral part of the campaign process. They provide continuity and stability year in and year out, with or without elections. Their endurance has been demonstrated historically. They work and assist candidates by helping with funding and spending, particularly in general election campaigns. Often, but not always, the work of the parties is coordinated with candidates on the party ticket. At the federal level, coordinated expenditures are provided for in the law, and serve as an important link between parties and candidates.

PACs AND PARTIES: A COMPARISON

It is inaccurate to characterize parties as "super PACs" or PACs as "mini-parties." PACs may sometimes seek to influence party nominations, occasionally with their own candidates, but PACs generally do not extend their electoral activities beyond making financial contributions, seeking to influence candidate recruitment by parties, and voter mobilization. Many interest groups are unable to mobilize their supporters as readily as they once could, and their main activities are in financing and also in lobbying once candidates are elected to office.

Political party committees generally do not become involved in financing the campaign of any candidate of the party's nomination, unless that of an incumbent President or Governor running for reelection. PACs may contribute as much as $5,000 to any candidate for presidential nominations, but unlike individual contributions, PAC contributions are not matchable by federal funds. In practice, PACs have played a rather limited role in direct presidential pre-nomination campaign financing; in recent years, PACs have contributed less than 1 percent of the pre-nomination receipts of presidential candidates.

In the general election period, majory party nominees for the presidency are automatically eligible for public treasury grants to finance their campaigns. These grants are given directly to the candidates' own campaign organizations. The public grant also serves as a general election campaign expenditure limit. Minor party and new party candidates may qualify for partial public subsides under specified conditions. Major party nominees who accpt public funding for the

general election period are prohibited from raising private funds to further their campaign efforts. Candidates, however, may raise funds from private sources to help pay the costs of complying with the campaign finance laws. In recent years, presidential candidates and their staffs also have worked to raise "soft money" for use by their party.

Under the FECA, the national parties can make coordinated expenditures on behalf of both presidential and congressional candidates. Coordinated expenditures by parties are extensions of the candidates' campaigns in which the parties agree to pay expenses for certain obligations incurred by candidates' campaigns. Coordianted expenditures were considered to be so important by the Congress in writing election laws that they were provided for in the publicly funded presidential campaigns, and in the non-publicly funded congressional campaigns.

The national committees of the political parties may make coordinated expenditures on behalf of their presidential and vice presidential candidates up to two cents per voting-age person adjusted by the Consumer Price Index. In 1996, both the Republican National Committee and the Democratic National Committee made coordinated expenditures for their general election presidential tickets.

In addition, state and local party committees may spend unlimited amounts on behalf of their parties' presidential tickets so long as the money is expended on volunteer activities, which may include phone banks, voter registration and voter turnout drives. Money used for these purposes, sometimes called "soft money", may be raised and spent under laws in the individual

states in which such activities are conducted. The state laws often are more permissive than federal laws; some twenty states permit corporate and labor union political contributions and give freer rein to individual and PAC contributions. Often, too, the state disclosure provisions are not as strick as the federal disclosure requirements.

Party committees also may spend unlimited amounts on preparing and distributing sample ballots or slate cards and on campaign materials used in conjunction with grass-roots, volunteer campaign activity, such as buttons, yard signs and bumper stickers. Such spending may benefit the entire party ticket from the presidential and vice-presidential candidates to candidates for local offices.

In a surprising development in 1996, large amounts of soft money, about $69 million, was spent by the parties on televised issue advertising that was nationally directed by the presidential campaigns; this became a very controversial use of what was intended by the 1979 Amendments to the Federal Election Campaign Act to be money for party grassroots activities.

PACs may not contribute directly to a publicly-funded presidential general election campaign. Such committees and their corporate or labor organization sponsors, however, may spend treasury funds to assist specific presidential candidates, for example, through partisan communications with their restricted classes of persons, through ostensibly non-partisan voter registration and turnout drives and, in the case of PACs, through independent expenditures, or as soft money.

Party coordinated spending in Senate contests is determined according to state population while campaigns for the House are all eligible to receive an amount based on an average of populations in House district. In 1996, party coordinated expenditures in U.S. Senate campaigns amounted to $19.9 million in addition to party contributions (limited to $17,500 per candidate per campaign period) totalling $1.6 million. Also in 1996, party coordinated expenditures in U.S. House campaigns amounted to $15.1 million, and party contributions to House candidates (limited to $5,000) totalled $4.1 million.[8] These amounts illustrate the legally-sanctioned need for candidates and parties to work closely together. National party committees spent additional amounts on televised issue spot announcements, "institutional advertising", and party-building activities designed to promote the party and its issues. Accordingly, party support is more than the dollor amount. The party contributions in direct assistance to candidates are much greater and it is important to note that the party is not considered to be a corrupting influence. (See Exhibit B).

Federally-related party committees have raised more than PACs in recent election cycles—$627.9 million gross in hard and soft dollars, compared with PACs $437.4 million in the 1995-96 election cycle. Yet total PAC contributions to presidential, Senate and House candidates and PAC independent expenditures for or against candidates have exceeded national party contributions to candidates combined with limited party

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[8] Federal Election Commission, "FEC Reports Major Increase in Party Activity for 1995-1996," press release, March 19, 1997, p. 5.

contributions and coordinated expenditures on their behalf by a 3-1 ratio (PACs $228.4 million compared with parties $71.0 million in the 1995-96 election cycle).[9]

In the 1995-96 election cycle candidates for Congress raised $790.5 million and spent $765.3 million. As Exhibit B indicates, PACs contributed or spent independently $228.4 million and parties contributed or spent in coordinated or independent expenditures only $71 million. Party contributions are law because party contribution limits to federal candidates are low: $5,000 per election to House candidates, and $17,500 to Senate candidates per calendar year in which the candidate seeks election. Amounts of party contributions to Senate and House candidates totalled only $5.9 million.

And party coordinated expenditures are relatively low, also, based on two cents multiplied by the State Voting-Age Population (plue a cost-of-living increase). The amount of coordinated expenditures totalled some $53.6 million, which was the largest component of party assistance. But $18.4 million went to the presidential campaigns, leaving only $35.2 million for scores of Senate and hundreds of House candidates. Party independent expenditures, totalling $11.5 million, were a new feature of the 1996 campaigns, following the Supreme Court decision in the instant case, which sanctioned them.

In the decades since 1974, when coordinated expenditures were allowed for both presidential and congressional campaigns, there has been any dispute relating to them, no charges of corruption or the

[9] Federal Election Commission, "PAC Activity Increases in 1995-96 Election Cycle," press release, April 22, 1997.

appearance thereof, so clearly coordinated expenditures could be increased substantially or unlimited without fear of corruption. One party may have more money to spend on coordinated expenditures, causing some grumbling, but neither major party has made official complaints about the factor.

The political parties are limited in the amounts of coordinated expenditures they can make on behalf of both presidential and congressional candidates, but the limits were enacted with a view to reducing overall spending, not because coordinated expenditures were in any way considered to be corrupting. Coordinated expenditures could be without limit and there would be no question of corruption or the appearance of corruption. Individuals and PACs were not given the privilege of coordinated expenditures; they were limited in the amounts they could give, but beyond them, of course, they can engage in independent expenditures, issue advertising, or giving soft money. The reason the law specifies coordinated expenditures lays in the harmonious interactions that parties and most—but not all—candidates have. Political science studies have shown that party loyalty is a stronger determinant of roll call voting in the Senate and House than are ideology, constituent needs and desire, or patterns of contributions.[10] Thus coordinated expenditures are sanctioned by law but because they are limited by voting age population in any state, they tend to be minimal even in very large states. In Colorado,

[10] Summarized in Larry J. Sabato, *PAC Power: Inside the World of Political Action Committees.* (New York: W.W. Norton & Company, 1984), pp. 136-40.

party coordinated expenditures on behalf of a senatorial candidate were only $170,932 in the 1996 elections.

Historically, political parties at the peak of their influence, recruited candidates and, with the aid of patronage, jobs and other favors, enlisted armies of campaign workers who canvassed door-to-door, organized meetings and rallies and turned out the vote. State and local committees were of chief importance in conducting this electoral activity, not only in senatorial and congressional elections but also in presidential elections. That party committees, particularly national party committees, can provide candidates with limited sums of campaign money—as now is the case at least with the party coordinated expenditures on behalf of presidential and selected congressional candidates—simply represents significant amounts of money in statutorily-sanctioned party activity on behalf of candidates.

In terms of dollars, party support outweighs PAC support of presidential candidates whereas PAC contributions are greater in Senate and House campaigns. In the aggregate PACs can contribute more than parties because there is no aggregate limit for PACs; PACs can contribute up to the contribution limit to an unlimited number of candidates. Party support cannot be evaluated only in dollars but must include intangibles, such as the value of campaign related activities and the candidate's use of the party label. Recognition of these facts helps place comparisons of PACs and parties in perspective.

The United States has not developed labor parties or Christian Democratic parties, as other mature democracies have. The country is too diverse, with

many conflicting special interests and only two major parties, so party and candidate appeals have to be calibrated to broad parameters beyond single special interests.

Alexis de Tocqueville observed in the 1830s, American political life often has witnessed the creation of new forms of association to further people's interests and goals.[11] Such associational activity inevitably comes with a vibrant democracy. PACs represent an aspect of American pluralist democracy, not only because the rights of association and speech are protected by the First Amendment.

Many PACs are ideology-and issue-related, thus providing a significant means of expression. Some 4,000 PACs are registered with the FEC, and an estimated 12,000 exist at the state level. These numbers are impressive, representing many diverse views and interests. PACs financial participation in campaigns is disclosed and limited. In this respect, PAC participation is preferable to groups' engaging in independent expenditures, or asking their members to contribute directly as individuals.

PACs have made several significant contributions to the political system. They increase participation in the political process. They allow more voices to be heard in determining who will be elected. PACs also allow individuals to increase the impact of their political activity given that they attain a sense of achievement that accompanies taking part in political activity with like-minded persons, instead of merely acting alone.

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[11] Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1994).

Additionally, PACs are a mechanism for political fund raising that respects the manner in which society is structured. Occupation and interest groups, which PACs represent, have replaced the neighborhood wards or precincts as centers of political activity.

Thus PACs encourage the lively pluralism so highly valued and forcefully guaranteed by the Constitution. PACs also help ensure the transmission of candidates' views and positions, while encouraging the participation of individuals without wealth to run for office. Finally, PACs had contributed to greater accountability in political financing. By sanctioning the use of PACs, the laws governing them have replaced the undisclosed and questionable forms of secret money derived from sources PACs now represent. But PACs are relatively new in the political arena compared with parties which have endured through American history.

Political parties have some surface similarities with PACs and other groups: they all act in the political arena, they all seek to elect candidates of their choice, they all spend money, they all want some policy outcome. But parties have one vital difference from interest groups: while the various interest groups (and their PACs) usually have one specific goal or concern, political parties represent an amalgam or coalition of interests and goals; moreover, the purpose of parties is to gain control of government, rather than to pursue single goals, as PACs do. For example, the Sierra Club seeks to protect the environment. The Business Roundtable looks out for big business. The AFL-CIO represents union members and workers. The NAACP speaks out for racial minorities. The National

Organization for Women pushes feminist causes. And so on.

Political parties seek to win elections by bringing together coalitions of such groups and by articulating issues that will resonate with voters. Political scientists generally value highly this activity as important consensus building in a diverse democracy.[12] Also, using the party as a financial intermediary weakens the potentially corrupting link between contributor and office-holder. Accordingly, the concept is to strengthen the parties' roles in campaigning, where the parties act as service organizations for candidates, providing broadcast facilities, pooling polling and other functions that by mass purchase may reduce costs for individual candidates.

As noted above, interest groups tend to be very parochial in their politics. By contrast, our two major parties have always been broad coalitions. Both parties are required to build broad coalitions and tack to the center. Interest groups usually respond to just one set of issues or constituents. Parties cannot afford to be captured for very long by single issue advocates.

Unlike special interest groups or PACs, parties must appeal to majorities in the electorate if they are to win; and unlike single issue organizations, they must win many races if they are to govern. Parties thus give coherence to American politics. Parties have been a

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[12] See, for example, David E. Price, *Bringing Back the Parties* (Washington, D.C.: CQ Press, 1984); and Larry J. Sabato, *The Party's Just Begun: Shaping Political Parties for America's Future* (Glenview, IL: Scott Foresman and Company, 1988).

unifying force in this system, building coalitions and making mass democracy possible.

Limits on party contributions or expenditures cannot be considered merely marginal restrictions. The primary purpose is for the party to communicate as widely as is possible, and it does this in part on its own and in part through its candidates. In lieu of unlimited party support, PACs representing special interests compete for the candidates' attention. It enhances democracy to encourage the broader interests parties represent, than the narrower interests of PACs. Party support leads to enhanced accountability, and hence is highly desirable.

CORRUPTION

The word "corruption" is widely misused and wildly exaggerated. Some but not all of what is called corruption consists of legally-sanctioned actions that some people do not like; political contributions when defined and limited in law would seem to fall in that category. Political corruption cannot be defined in the commonly-accepted meaning of the term. It is not bribery, nor even legalized bribery, as some critics put it; that is covered by existing statutes relating to one-on-one exchanges of money. Rather, in political terms, the giving of a sizable contribution usually represents only a potential of good will and perhaps disproportionate access to public official in order to plead a case for public policy change. It is a means of gaining access in order to make one's view known. While it may ensure access and perhaps unequal political influence, it does not necessarily provide the claimant with a favorable public policy. If by corruption critics mean influence or influence-peddling, then these lead to a slippery slope

because so many factors may be influential in a decision—religion, school, family, ethnic background, others, all may influence a public official's public actions. Even without making a money contribution, access is likely to be granted to a representative of a company employing hundreds or thousands of workers crucial to a district or state; or to a union leader representing a substantial membership.

Webster's Dictionary defines corruption as "an impairment of integrity, virtue or moral principle . . . an inducement by means of unlawful or improper means."[13] In the *Encyclopedia of Political Parties & Elections in the United States*, a political science definition of corruption in relation to urban machines was given: "all machines were corrupt to varying degrees. They were in business for profit, and they all stole in one manner or another from the public treasury."[14] As we shall see, money raised by and for a modern-day political party for its own candidates does not fit either definition.

In their *amicus curiae* brief to the Supreme Court in the instant case, the Committee for Party Renewal (hereafter "Committee") reviewed the Supreme Court's ruling in regard to corruption and campaign finance law, saying "the only compelling interests recognized by this Court supporting the Federal Election Campaign Act's limitation on political speech are the

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[13] Philip Babcock Gore, editor, *Webster's Third New International Dictionary of the English Language*, unabridged (Springfield, MA: Merriman-Webster, Inc., 1986), p. 512.

[14] *Political Parties and Elections in the United States: An Encyclopedia*, general editor L. Sandy Maisel (New York and London: Garland Publishing, Inc., 1991), pp. 1161-62.

risk of actual corruption or the appearance of corruption."[15] The Committee quoted the Supreme Court's landmark *Buckley v. Valeo* decision: "the primary interest served by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." Thus, unless a party's financial support of its candidates is somehow corruptive, or appears to be corruptive, the government has no compelling interest in limiting such activity.

The Committee then wrote: "Political party support of its candidates is not corrupting. No conventional concept of corruption delineates the candidate-party relationship," which needs to be understood as symbiotic.[16] After all, parties are formed to win elections, not make a profit as in the political science definition given above. Parties do not bribe candidates or "induce them to do wrong" as in the Webster's definition. (Private interests occasionally do as in the Abscam or "Keating Five" cases).

A strong two-party system imbued with a professional code of ethics might have prevented Watergate or the 1996 experience of alleged improprieties with respect to the solicitation and acceptance of certain foreign or other political contributions. The two major

[15] *Brief Amicus Curiae, Committee for Party Renewal, Colorado Republican Federal Campaign Committee and Douglas L. Jones v. Federal Election Commission*, on writ of certiorari to the United States Court of Appeals for the Tenth Circuit, October Term 1995, p. 8.

[16] *Ibid.*, p. 10.

parties expect to be in business indefinitely and supposedly neither would willingly pursue tactics that would bring revenge or disgrace. However, both Watergate and the 1996 experience can happen when the parties are dependent on presidents or the Congress, rather than the opposite—when the party is accountable to popular majorities and each officeholder is accountable to the party.[17] One certainty is that disclosure of campaign financial data in 1996 was largely responsible for the information leading to news about the scandal.

One other question of presumed party influence over candidates needs mentioning. Critics say that unlimited party contributions threaten the individual and PAC contribution limits because individual or PAC contributions to parties can be used to supplement those limits. For example, an individual donor can give the maximum to a candidate, then give more to the candidate's party, which in turn can give to the same candidate or spend on the candidate's behalf. Thus the party could serve as a conduit to enable contributions above and beyond the individual's contribution limit. However, the party is an autonomous entity and has its own leaders and its own decision-making procedures and criteria as to which candidates will receive party financial support. The party will not redirect the money to the candidate automatically, but will decide on the basis of its multiple claims which money will go to which candidates. Party decisions are based on need and perceptions of candidate electabilty and are likely

[17] Stephen Hess, *The Presidential Campaign: An Essay*, third edition (Washington, D.C.: The Brookings Institution, 1988), pp. 86-87.

to be determined jointly with the candidates as to what spending is justified. If money is earmarked by the donor requiring that the party assist a named candidate, under federal law, the required disclosure must include information that the contribution is directed. Thus the public, the media, and the Federal Election Commission would know that the contribution was earmarked and could act on that information accordingly.

The attitudes of Members of Congress toward their parties surely differ, but a common view was expressed by former Democratic House Speaker .Thomas P. O'Neill, who stated that those who entered the Congress since Watergate and the Vietnam War" . . . had no loyalty to the party whatsoever. They looked down on it. They said, "The party didn't elect me, and I'm not beholden to the party."[18] Campaign consultant David Garth even notes that "the [political] boss is a plus to have against you."[19]

While surely this O'Neill quotation is an exaggeration, some sixteen years later, clearly many Members are quite independent of the party, both programmatically and financially. Reinforcing that position, O'Neill also said that the party leadership in the House always understood and accepted that some Members had to keep their distance from the party.[20] In these circumstances, the party would hardly be able to corrupt

[18] Quoted in Steven V. Roberts, "For New Speaker, New Role is Seen," *The New York Times*, December 8, 1986.

[19] Quoted in Alan Eysen "Tracking the Decline of Party Organizations," *Newsday*, April 23, 1981.

[20] *Man of the House: The Life and Political Memoirs of Speaker Tip O'Neill*, with William Novak (New York: Random House, 1987), pp. 281-83.

the Member, no matter how much money or support it provided. Winning the next election takes precedence over party loyalty. The view that America typifies a candidate-centered culture, with a great deal of candidate independence, is widespread among political scientists.[21] Elected officials do not like to be beholden to their party or to a contributor. They value their independence. To quote one scholar: "Politicians prize votes more than dollars,"[22] and one may add, "or party."

Political parties do not corrupt public officials through making contributions or providing support to them. There is no reason to believe that unlimited party coordinated expenditures would corrupt candidates or public officials. Party leaders and public officials are more likely to engage in joint decisions on what level of support is desirable for a given candidacy. Their common ideology and need to win elections should inform party decision making, not pressure on the basis of contributions or assistance given. For the most part, party leaders and public officials are engaged in a joint enterprise seeking common goals.

In this context, it is important to point out that individuals contribute money to politics for a variety of reasons. A recent study of contributors suggested that there are a variety of motives that can be factored into three basic reasons: purposive, solidary (social), and

[21] Martin F. Wattenberg, *The Decline of American Political Parties*, 1952-1980 (Cambridge, MA, Harvard University Press, 1984); and Martin F. Wattenberg, *The Rise of Candidate-Centered Politics: Presidential Elections of the 1980s* (Cambridge, MA: Harvard University Press, 1991).

[22] Alexander Heard, *The Costs of Democracy* (Chapel Hill: The University of Noth Carolina Press, 1960), p. 6.

material.[23] Purposive behavior includes those who participate in politics to influence governmental policies or to make a difference in the outcome of an election. Solidary includes those who give out of friendship for a candidate, those who enjoy the social contacts that politics provide, or those who seek recognition. Material behavior refers to those who give for business or employment reasons or because it is expected of someone in their position. These categories are not mutually exclusive and may jointly apply to motivations for giving by some individuals or PACs.

Not all these categories apply to contributions made by party committees to candidates on the ticket. The most relevant is the purposive motivation, to seek to influence governmental policies and to make a difference in the outcome of an election. This purpose well describes the ideological content of a party committee, which is surely to elect as many candidates as possible in order to gain control of a legislative chamber or an executive position, in order to further party platforms and positions, as well as to benefit from the spoils of victory, the appointments and domination of the decision-making processes of government.

This review of relationships among parties and public officials leads to the conclusion that party spending does not lead to corruption, nor would unlimited party assistance to candidates lead to corruption.

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[23] Clifford W. Brown, Jr., Lynda W. Powell and Clyde Wilcox, *Serious Money: Fundraising and Contributing in Presidential Nomination Campaigns* (Cambridge: Cambridge University Press, 1060), p. 6.

One other factor in party support of candidates on the ticket is important. That is, political scientists have constructed indices of political participation, ranging from talking about politics to writing letters to public officials to volunteering time to work for the party or candidate, to voting, to soliciting or contributing money.[24] These latter two points in the index convey the thought that contributing money is a significant form of political participation, which in a democracy is to be encouraged, not discouraged. Contributing money thus can be an act that is positive, part of a complex of activity thought to be desirable in a pluralistic, democratic society.

Looking to the future, the parties need to become the anchors of a political system in which they are dynamic and relevant instrumentalities producing the best combination of national interest and state and local concerns. The single most important byproduct of the activities of the parties would be to help create a climate and an infrastructure in which the parties could pursue, each in its own way, the improvements in financial operations and support so necessary to the proper functioning of the political and electoral systems. In our candidate-centered culture, it is desirable to keep candidates close to the parties on whose tickets they run. Parties have concerns other than merely electing a president or a senator; there is some thought to the future, to long-term responsibility to protect the

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[24] See, for example, Lester W. Milbrath, *Political Participation: How and Why Do People Get Involved in Politics* (Chicago: Rank McNally & Company, 1965), p. 18; and Sidney Verba and Norman H. Nie, *Participation in America: Political Democracy and Social Equality* (New York: Harper and Row, Publishers, 1972), Table 2-1, p. 31.

party's reputation. Ultimately the way to get more accountability and responsibility in political finance would seem to be through democratically-reformed and strengthened political parties, not by enhancing candidate independence.

INDEPENDENT EXPENDITURES

Independent expenditures are much more likely to help or hurt individual candidates and only indirectly to affect parties. One exception occurred in 1980, when independent advertising against five Democratic Senators was effective in helping Republicans gain control of the U.S. Senate.

In upholding the First Amendment guarantees of freedom of speech and freedom of association, courts have consistently held that individuals and groups have a right to use independent expenditures to communicate with voters; while the law may limit expenditures by a campaign in circumstances where public financing is provided in exchange, individuals and groups have the right to spend unlimited amounts of money to advance or undermine a given candidacy, so long as they do not coordinate their activities with the campaign.

While supporting the letter and spirit of this doctrine, nevertheless, independent expenditures raise questions about accountability; independent expenditures can shape campaign discourse and popular opinion but, unlike candidates and parties, individuals and groups engaging in independent expenditures do not appear on the ballot and, as a result, cannot be electorally rewarded or punished for their conduct. Thus, despite their disclosure, independent expenditures lack

accountability and they are an inefficient way to campaign.

However, there is one recent use of independent expenditures that is accountable, when undertaken by political parties. In the instant case, the Supreme Court sanctioned independent expenditures by party committees. On one level, it is possible to agree with the Court's reasoning that if PACs and other groups have the right to independent expenditures, so should parties, as freely-associated groups of like-minded persons, have the same rights. But the Supreme Court failed to note that by their very nature, parties seek to integrate their campaigns with those of candidates on the ticket. The closer the association the better, and an artificial separation is not desirable. Those who value parties' integrative role will view this development as counter-productive. But the party independent expenditures disclosed in 1996 were minor amounts in the context of all party spending in the 1996 elections.

It is a natural relationship for parties and candidates to work together toward the common goal of winning elections, by coordinating their activities. This close relationship does not increase the risk of corruption, but rather encourages party committees to support with funding candidates who are faced with millionaire opponents, negative independent expenditures or negative issue advertising by interest groups. Accordingly, anything such as independent expenditures that would tend to isolate the party, or part of it, from candidates, destroys the healthy relationship among candidates and parties whose labels they use.

Independent expenditures are not natural acts for parties. The normal workings of parties include:

recruiting candidates and writing platforms, raising funds to support those and candidates and organizing voters. It seems to be an unnatural act for a party to go outside its normal structure with an "independent expenditure." Yet, if the campaign finance reformers succeed and outlaw these natural acts for the parties, then they will increasingly have to use independent expenditures to get their message out. Candidates cannot win without a clearly communicated message that is heard by a majority of the voters. If parties cannot present their message through the traditional means—i.e., advertising—then the burden will fall on other groups, mainly special interests. What makes the most sense is to give the widest berth to permit parties to participate as fully as they can; preventing parties from electioneering will only leave message presentation up to uncontrollable and unaccountable special interests.

On its face, the theory of independent expenditures conflicts with the idea of coordinated expenditures. One may ask how a part can both communicate with candidates in providing money support, while at the same time not communicate when providing independent expenditures on behalf of its candidate or against its candidate's opponent. Certainly unlimited coordinated expenditures are a preferred way to proceed.

SPENDING LIMITS AND FREE SPEECH

One aspect of free speech is the question of whether to impose spending limits. Those who advocate expenditure limit do so on two grounds: (1) to control high costs; and (2) to level the playing field so there is not a wide disparity between spending by candidates for the same office. In response, it can be said that

spending is impossible to control. Time and again, legislation has been proposed (and occasionally enacted as in 1911, 1925, 1940, 1971, and 1974) supposedly designed to control or limit political spending, but without success at any time.

Since 1976, in the Supreme Court decision in *Buckley v. Valeo*, spending limitations are sanctioned as constitutional only when imposed as a condition of the acceptance of public financing by a candidate. In this way, public financing provides a linkage making spending limits constitutional. With respect to spending limits, in the 1996 presidential general election campaigns, three distinct but parallel campaigns were conducted.[25] Only one of them operated under legally-imposed spending limits; the other two were not limited, and so account for additional spending not controlled by the limits. The three campaigns break down as follows: in the first campaign, spending was limited by law to the $61.8 million provided in public funding. This money could be supplemented by allowable national party coordinated expenditures of $12 million, making the official spending limit $73.8 million.

In addition to the public funding given to all major candidates (the Democratic and Republican nominees plus Ross Perot in the general election period in 1996), federal law allowed the two national parties to spend another $12 million on coordinated expenditures. As noted earlier, these coordinated expenditures are specifically directed by the two major parties on behalf of their presidential and vice-presidential nominees.

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[25] Herbert E. Alexander, "The Money Story," in *America at the Polls 1996* (Storrs, CT: The Roper Center for Public Opinion Research, 1997), Table 7, p. 146.

They are not like independent expenditures because that party nominees and chairmen have direct control over how and where this money is spent. In 1996, these funds were mainly used to supplement advertising in key target states such as California. Coordinated funds are an extension of the candidates' campaigns. Parties agree to pay expenses for certain obligations to be incurred by its candidates and coordinated spending goes toward paying some of these costs.

In the second campaign, however, spending is provided for, but not limited under the law. A small portion represents funds raised under the law to pay the costs of legal compliance. A much larger portion was used to pay direct and indirect campaign costs, beyond the limits. This was "soft money" contributions raised by the parties outside federal limits from wealthy individuals, corporations and labor unions. It represented money spent on the nominees' behalf by labor unions, trade associations and membership groups on partisan communications with their constituencies and on nominally non-partisan activities directed to the general public but clearly intended to benefit the nominees. This money was in addition to labor PAC contributions, which are statutorily limited.

In the third campaign, independent spending was conducted by individuals and groups legally permitted by the First Amendment to spend unlimited amounts to advocate the election of defeat of specific candidates, as long as they do so without consultation or collaboration with candidates and their campaigns.

Adding together the amounts spent on these three aspects of the presidential campaigns in 1996, as seen in Exhibit C, a total of $151.4 million was spent by or on

behalf of the Clinton-Gore ticket, and $130.3 million by or on behalf of the Dole-Kemp ticket.

Thus all three phases of the presidential selection process provided evidence that the overall spending limits were not effective.

While there was increased spending by the parties and candidates in 1996, there also was a marked increase in spending on behalf of, or against, candidates by political parties, labor unions, businesses, the Christian Coalition and others. Some of this money was disclosed and some was not disclosed, and some was beyond the control of the candidates and parties. In contrast, party spending is fully disclosed, and the parties and candidates jointly control how the money is spent.

Indeed, the payouts from the Presidential Election Campaign Fund hit an all-time high of $234 million in 1996, and the Citizens' Research Foundation estimate that a total of 4 billion dollars was spent on all political campaigning in the 1995-96 election cycle. (For perspective that figure is roughly equal to the federal deficit in 1970, but a bit less than the combined advertising budgets in 1996 of the country's two largest advertisers, Procter and Gamble and Philip Morris).

At the very least, the development of these three parallel campaigns underlines the futility of attempting to impose a strict system of campaign spending limits. In our political system-animated by a variety of competing interests, each guaranteed freedom of expression—when the flow of money is restricted at any point in the campaign process, it will inexorably carve new channels through which individuals and

groups can seek to influence political campaigns and elections.

Our pluralistic system has been criticized as favoring organized groups with abundant memberships or resources, but not necessarily helping the unorganized: the poor, the black, consumers, youth and the elderly. One of the roles of political parties is to advocate public policies that would assist these elements of the population. Indeed, parties are sometimes charged with being servants of special interests but they are as often countervailing forces against certain special interests. They cannot long be identified solely with a single special interest to the detriment of their wider role as aggregators or brokers of numerous, sometimes opposed, diverse interests.

CONCLUSION: POLITICAL REFORM AND REALISTIC IDEALISM

Politics is about people and groups of people, their ideas, interests and aspirations. Since people seek political fulfillment partly through parties and partly through interest groups, a politics in which supportive groups are excluded or seriously impaired is difficult to envisage. Too many ideas and interests of value to society would get lost without the organized participation of groups in electoral politics. Some groups with few members participate mainly through their wealth. Since people and groups differ, conflict occurs, but it does so in a political arena in which government sets the rules and the players are expected to play by them. The government, however, is also a player and the only fail-safe guarantee against its dominance lies in the ability of groups and interests in society to articulate their demands, to coalesce through political parties, and

to oppose government policies with whatever resources, including money, that they command.

The three most significant events of the last three decades—the civil rights movement, the Vietnam peace movement, and political reform—originated in the private sector, where the need for action was perceived and where the needed organizations were established to carry it out. Also, the women's and gay rights and environmental movements bubbled up from the grassroots. Government reacted but did not initiate the activity, and government was part of the problem in each case. Hence, there is a strong case for the continued existence of interest groups, which are aggregations of like-minded people whose political power is enhanced by combining forces in coalitions allied with political parties. Without parties, individuals in mass society are atomized and ineffectual.

The most enduring changes normally are made by those with a stake in the outcome: by the incumbents, the major political parties and major interest groups. In the early 1970s, reformers and the media helped set the outer limits of reform by conditioning the atmosphere. But the actual changes were forged in the arena of political pressures, limited by the Constitution as interpreted by the courts.

What the federal and many of the state laws need is campaign finance regulation that is both constitutional and pragmatically designed to keep the election process open and flexible, rather than rigid, exclusionary and fragmented.

Candidate and party interdependence enhances political responsibility and accountability. Candidates

and party interdependence also tends to lead to easier mobilization of party majorities in the Congress. And finally, it leads to stronger candidacies among challengers and in open-seat contests.

Of course, the ultimate means of reducing financial pressures on candidates is to enable the political parties to help candidates with unlimited support.

EXHIBIT A

HERBERT E. ALEXANDER

Professor of Political Science and
Director, Citizens' Research Foundation
University of Southern California
3716 South Hope Street, #328
Los Angeles, California 90007

Born: Waterbury, Connecticut
December 21, 1927

Married; 3 children

Education:	1949	B.S. Political Science University of North Carolina
	1951	M.A. Political Science University of Connecticut
	1958	Ph. D. Political Science Yale University
Experience:	1954-55	Administrative Assistant and Research Fellow, Money and Political Project Institute for Research in Social Science, University of North Carolina
	1956-58	Instructor, Department of Politics Princeton University

	1958 -	Director, Citizens' Research Foundation Princeton, New Jersey (1958-78) Los Angeles, California (1978—)
	1965	Visiting Lecturer, Department of Politics Princeton, New Jersey
	1967-68	Visiting Lecturer, Department of Political Science, Wharton School, University of Pennsylvania
	1977	Visiting lecturer, Department of Political Science, Yale University
	1978 -	Professor of Political Science University of Southern California
Commissions:	1961-62	Executive Director, President's Commission on Campaign Costs
	1966-67	Member, White House Study Group
	1969-70	Member, Task Force on Financing Congressional Campaigns, Twentieth Century Fund
	1983-84	Member, Task Force on Political Action Committee, Twentieth Century Fund

Consultancies:	1962-64	To the President of the United States
	1965-67	To the Department of Treasury
	1966	To the Columbia Broadcasting System - News
	1966-67	To the House Administration Committee, U.S. House of Representatives
	1966-68	To the Committee for Economic Development
	1968-69	To the Institute of Public Affairs
	1968-69	To the Commission on Campaign Costs in an Election Era
	1968-69	To the National Commission on the Causes and Prevention of Violence
	1968-69	To the Special Committee on Congressional Ethics of the Association of the Bar of the City of New York
	1971-72	To the Sloan Commission on Cable Communications

1972-73	To the John and Mary R. Markle Foundation
1972-73	To the Comptroller General and the Office of Federal Elections
1973	To the Subcommittee on Campaign Spending and Contributions of the Legislative Research Commission of Kentucky
1973-78, 1982 1986-88	To the New Jersey Election Law Enforcement Commissoin
1973-74	To the Select Senate Committee on Presidential Campaign Activities
1974	To the Governor's Commission on Campaign Reform, Providence, Rhode Island
1974-76	To the New York State Board of Elections
1974	To the Ethics Committee of the Better Government Association in Chicago
1974-76	To the Illinois State Board of Elections

1974-75	To the Congressional Research Service, Library of Congress
1978-79	To the Ford Foundation
1979	To the Accountants for the Public Interest
1981	To the Institute for the Future, Menlo Park, California
1982	To "20/20", ABC News
1983	To the Alabama Council for the Humanities
1984	To the California Commission on Campaign Financing
1985-86	To the Commission on National Elections, Center for Strategic and International Studies, Georgetown University
1985-86	To the President's Commission on Organized Crime
1987	To the Office of the Governor, Rhode Island
1987-88	To the New York City Charter Revision Commission

1987-88	To the New York State Commission on Government Integrity
1988	To the Campaign Finance Task Force, Connecticut
1989-92	To the Campaign Finance Board, New York City
1990	To the Senate Campaign Finance Reform Panel (appointed by Senators George Mitchell and Robert Dole)
1996	To the Indian General Assembly Committee on Campaign Finance

Dr. Alexander has written, co-authored or edited more than twenty books and 100 articles on matters relating to money in politics, its uses and regulation. Among the books are:

Alexander, Herbert E., and Corrado, Anthony. *Financing the 1992 Election.* Armonk, New York: M.E. Sharpe, Inc., 1995.

Alexander, Herbert E., and Bauer, Monica. *Financing the 1988 Election.* Boulder, Colorado: Westview Press, 1991.

Alexander, Herbert E., and Haggerty, Brian A. *Financing the 1984 Election.* Lexington, Mass: D.C. Heath and Company, 1987.

Alexander, Herbert E. *Financing the 1980 Election.* Lexington, Mass: D. C. Heath and Company, 1983.

_____, *Financing the 1976 Election.* Washington, D.C.: Congressional Quarterly Press, 1979.

_____, *Financing the 1972 Election.* Lexington, Mass: D.C. Heath and Company, 1976.

_____, *Financing Politics: Money, Elections and Political Reform*, 4th ed. Washington, D.C.: CQ Press, 1992.

_____, *Reform & Reality: Financing State and Local Campaigns.* New York: Twentiety Century Fund Press, 1991.

Alexander, Herbert E., and Haggety, Brian A. *PACs and Parties: Relationships and Interrelationships.* Los Angeles: Citizens' Research Foundation, 1984.

Alexander, Herbert E., ed. *Political Finance.* Beverly Hills: Sage Publications, 1979.

Alexander, Herbert E., and Haggerty, Brian A. *The Federal Election Campaign Act: After a Decade of Political Reform.* Los Angeles: Citizens' Research Foundation, 1981.

Alexander, Herbert E., ed. *Campaign Money: Reform and Reality in the States.* New York: The Free Press, 1976.

_____, *Money in Politics.* Washington, D.C.: Public Affairs Press, 1972. Available from Citizens' Research Foundation.

_____, *Chasing Money in Politics*. In process. To be published by Oxford Unversity Press.

Among editing tasks and articles, he

wrote	"Trends in the Regulations of Political Finance," in *Analysis of Federal and State Finance Law* (1975), published by the Federal Election Commission.
wrote	"Making Sense About Dollars in the 1980 Presidential Campaigns," in Michael J. Malbin (ed.), *Money and Politics in the United States* (1984)
co-authored	"The Switch in Campaign Giving," in *Fortune*, March 1970.
authored	"Financing Presidential Campaigns," in Arthur M. Schlesinger, Jr. (ed.), *History of American Presidential Elections*, 1789-1968 (1971).
edited	*Comparative Political Finance in the 1980s*, a collection of 11 articles, of which he wrote an introductory chapter as well as a chapter about the United States; published by Cambridge University Press (1989).
co-edited	*Comparative Political Finance Among the Democracies* (with Rei Shiratori), a collection of 13 articles, of which he co-

	wrote an introductory chapter and he wrote a chapter on the United States; published by Westview Press (1994).
edited	"Political Finance; Reform and Reality," *The Annals*, May 1976.
wrote	"A Way to Clean Up State Politics," *Reader's Digest*, July 1974.
wrote	"Can a Candidate Buy His Way Into Office.?" *TV Guide*, June 7, 1980.
was	a regular columnist in *Campaigns & Elections*, write "FEC Update" in each issue, 1981-86.

Dr. Alexander was chairman of the Research Committee on Political Finance and Political Corruption of the International Political Science Association from 1973 to 1994. He has traveled abroad widely, and observed elections and lectured in many countries. In 1987, he convened two conferences on comparative political finance, one at Villa Sebelloni, Bellagio, Italy; and the other at Villa Vigoni, Loveno do Mennagio, Italy. In June 1989, he observed the Polish elections, and in May 1990, he was a member of an official election-observer team to Romania. In September 1991, he participated in a Symposium on Election Reform in Buenos Aires, Argentina; he participated in another one on constitutional reform in Buenos Aires in 1993. He has made a number of tours for the United States Information Agency in various countries.

In 1991, he wrote a paper, "The Regulation of Election Finance in the United States and Proposals for

Reform," for the Canadian Royal Commission on Electoral Reform and Party Financing. He also participated in several of the Commission's conferences.

Among other lectures, he gave one, "Election Reform and National Politics," at the Smithsonian Institution in April 1980, and another, "The Greening of American Politics, at the John F. Kennedy Library in Boston in October 1990. Others have been given at universities, colleges, research organizations and before membership groups.

Dr. Alexander has testified scores of times before committees of the Congress, state legislatures, commissions and other government bodies.

He has made scores of appearances on television and radio, including every major network. He is frequently quoted in daily newspapers and in periodicals. He has written numerous Op-Ed articles in major newspapers.

In 1996, he received the Samuel J. Eldersveld Career Achievement Award from the Political Organizations and Parties Section of the American Political Science Association, for a lifetime of outstanding scholarly and professional contributions in the field.

In 1996-97, he chaired the Task Force on Campaign Finance Reform, a group of nine political scientists who issued *New Realties, New Thinking: Report of the Task Force on Campaign Finance Reform.*

June 1997

EXHIBIT B

POLITICAL PARTY ASSISTANCE TO FEDERAL CANDIDATES 1995-96 ELECTION CYCLE
(in millions)

Political Parties

Contributions	$5.9
Coordinated expenditures	53.6
Independent expenditures	11.5
TOTAL	$71.0

Source: Federal Election Commission press release, "FEC Reports Major Increase in Party Activity for 1995-96," March 19, 1997.

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PAC ASSISTANCE TO FEDERAL CANDIDATES 1995-96 ELECTION CYCLE
(in millions)

Political Action Committees

Contributions	$203.9
Independent expenditures	10.6
Candidates running in future years	13.9
	$ 228.4

Source: Federal Election Commission press release, "PAC Activity Increases in 1995-96 Election Cycle," April 22, 1997.

EXHIBIT C

TABLE 7: SOURCES OF FUNDS, MAJOR PARTY PRESIDENTIAL CANDIDATES, 1996 GENERAL ELECTION (in millions)

Sources of Funds		Clinton	Dole
Limited campaign funds			
Candidate controlled			
	Federal grant	$61.8	$61.8
	National party	6.7	11.7
Unlimited campaign funds			
Candidate may coordinate			
	Party soft money	53.9	47.8
	Labor, Corporate/ association	20.0	2.0
	Compliance	8.0	6.0
Independent candidate			
	Independent expenditures	1.0	1.0
Total		$151.4	$130.3

Source: Data provided by the Citizens' Research Foundation, based on Federal Election Commission and other data.

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN
COMMITTEE, ET AL., DEFENDANTS

[Filed: ____, ____]

AFFIDAVIT OF DONALD K. BAIN

DONALD K. BAIN, the affiant , being first duly sworn, deposes and says :

1. My name is Donald K. Bain. I am chairman of the Colorado Republican Federal Campaign Committee (Party), and have held that position since March, 1993. I have been involved in Colorado politics since the late1950's and have held numerous positions from block worker to state party chairman. I am of legal age and competent to testify.

2. I have read the First Amended Counterclaim that the Party intends to file in its lawsuit against the FEC and I verify the factual statements made therein.

3. In particular, I attest that the Party was, is, and for the foreseeable future will be ready, willing, and able to spend more in working with our candidates to support their candidacies than the pennies per voter allowed by the Federal Election Campaign Act (FECA). However, although we believe that the FECA limits on our coordinated spending are invalid, the Party is reluctant to exceed them and incur the risk of sanctions. Thus, we have been forced to forego political speech and association with our candidates that we believe to be constitutionally protected.

4. At one point during the 1996 campaign, a coordinated effort with one of our candidates seemed to be so necessary that we seriously considered the possibility of spending in excess of the FECA limits, reporting the expenditures (as we always do), and defending any FEC action on the grounds that the limits violate the First Amendment. Our candidate advised, however, that he was unwilling to cooperate in campaign activity that the FEC was certain to challenge. Accordingly, because of the FECA limits, the Party refrained from political speech that we considered urgently important.

5. The ability to make independent expenditures in support of our candidates, while welcome, is no substitute for the right to coordinate our political speech with our candidates and disseminate efficiently our common messages. We can be far more efficient, and our communications can be more focused, understandable, and effective if the Party and its candidates can work together.

6. Moreover, uncertainty as to what the FEC will regard as coordinated and the difficulties and burdens of refuting charges of coordination interfere with the

internal affairs of the Party. We exist in large part to support our candidates. We need to understand what help our candidates need and to assist in developing programs to best communicate our common views. It is very awkward for us, at the same time, to be worrying about how to preserve and prove our independence with respect to programs we pursue in support of our candidates. Inevitably, both some otherwise permissible independent speech and some coordinated speech are chilled and avoided.

7. My reference to difficulties of proof is deliberate. Complaints to the FEC have become commonplace in federal campaigns, and they can be damaging, both politically and financially. They must be defended, but the cost of proving you are right can, in itself, be serious punishment. As a result, whenever legal standards or factual situations are unclear, the Party has a strong incentive to steer clear and much permissible speech is deterred.

8. My experience has been that political campaigns are fluid and fast paced. Any rules must be clear and simple and depend on easily established objective facts. Otherwise, the result will be either self censorship, as the Party and its candidates avoid potential controversy at the expense of foregoing lawful but ambiguous activity, or extensive and burdensome litigation that eats up Party resources intended for political association and speech, not for lawyers.

I swear under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed in Denver, Colorado, this 22 day of November, 1996.

/s/ DONALD K. BAIN
DONALD K. BAIN

STATE OF COLORADO

ss.

CITY AND COUNTY OF DENVER

Subscribed and sworn to before me this 22 day of November, 1996.

Witness my hand and official seal.

My commission expires August 31, 1998.

/s/ JOANE LYNES
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 89 N 1159

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *ET AL.*, DEFENDANTS/COUNTER-PLAINTIFFS

[Filed: Apr. 21, 1997]

Declaration of Leon G. Billings

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1. My name is Leon G. Billings. From March 1982 until mid 1983 I was the Executive Director of the Democratic Senatorial Campaign Committee (DSCC). Sen. Wendell Ford was the Chairman of the DSCC at that time, and Sen. Alan Cranston chaired the Senate Democratic Leadership Circle (DLC), which was the major fundraising arm of the DSCC.

2. The DLC was created after the Democrats lost the Senate in 1980. Sen. Cranston controlled the fundraising for the DLC, and he had a separate staff person running that operation. However, the DLC did not determine how the money was spent. That was left to the DSCC.

3. The DSCC had a three-Member Executive Committee comprised of Sen. Ford. Sen. Cranston, and Sen. Bill Bradley. They basically made the decisions as to how to distribute the money, although there was also a larger committee that met occasionally to provide direction.

4. The DLC Leadership Circle bank account was a separate account. Funds would be transferred from that account to the DSCC account, which then made the funds available for the candidates.

5. To the best of my recollection, in 1982, the DSCC had $1.2 million to distribute. That seems like a paltry sum today, but there were a number of small, competitive races where the DSCC was able to make the maximum coordinated expenditure permitted under 2 U.S.C. § 441a(d). I think this was around $67,000. We were not able to spend the maximum amount in California, for example, where the limit was $500,000. We tended to focus our resources on Senators in tighter races, but another decisive factor was the extent to which incumbents helped raise money for the DSCC.

6. Sen. Cranston was far and away the best fundraiser the Democrats had. He had absolutely no reservations about asking for money. Sen. Cranston also enlisted the assistance of other key incumbent Senators who were in a position to raise money. By and large he focused on Senators running for reelection in that cycle. Other Senators had different styles, and used different approaches to fundraising.

7. My understanding was that Sens. Kennedy, Jackson, and Metzenbaum all had unwritten commitments from the DSCC that they would get back as much as they raised as a way to encourage Senators to raise money for the party.

8. Senators solicited a coterie of rich Democrats who traditionally have provided much of the Party's support. The DLC membership was $15,000, so one hundred DLC members would contribute $1.5 million. Sen. Cranston's goal was to have two DLC members in every State, and he came very close to that goal. He kept a list of contributors and would keep after Senators who had not yet recruited two members from their states.

9. The DLC sponsored elaborate events and forums where DLC members could socialize with other contributors and party leaders. Even though $15,000 does not seem like much today, this was enough to gain admission to these exclusive events in 1982.

10. The Senators who solicited the money for the DSCC could not promise that the money would be used directly in support of their own or another particular campaign, because earmarking contributions was prohibited. However, that did not mean that Senators who raised money could not be assured that they would get a significant return from their efforts. There appeared to be an understanding between the DSCC and the Senators that the amount of money they

received from the DSCC was related to how much they raised for the Committee.

11. The DSCC also raised money on its own behalf. Sen. Ford and I took whirlwind trips to relatively small fundraising events, in the $15,000-$25,000 range. We also hosted events at the Democratic Party's mid-term Convention; and the DSCC started a direct mail campaign during my time as Executive Director.

12. People often contribute to party committees because they have given the maximum amount to a candidate, and want to help the candidate indirectly by contributing to the party. The DSCC was able to provide substantial indirect support to Senatorial campaigns. For example, we did polling, and made the results available to the campaigns. We also made in kind contributions under the § 441a(d) limits. The DSCC made the decision as to how much a particular campaign was going to get, but the individual campaigns decided how it would be used.

13. In my view, contributions help contributors gain access, have their phone calls taken. And access can influence action, since the totality of the information a Member has is significantly prejudiced by the people who have access. A Member can feel guilty about taking money from those whose positions they rarely support.

14. I never called a Senator's office on behalf of a contributor's position. However, I once had a contributor ask me to set up an appointment with a Senator. I did pave the way by calling the Senator's Administrative Assistant to say, if it was convenient, this person would be calling for an appointment. When the

contributor called again with the same request, I turned him down.

15. There has to be some way of controlling distribution of the time available to talk to people, and priorities are more likely to be given both to calls where a Senator is soliciting money, or is talking to those who have contributed. That is what is wrong with the system today: the amount of time Senators spend talking to people they want to contribute, and talking to people who have already contributed, seeking additional contributions.

16. The DSCC and the state party committees have separate coordinated expenditure limits under § 441a(d). My recollection is that we sent a letter to each state party committee saying we planned to spend their share, and they should notify us if that was not acceptable. I think one state party resisted until it became clear to them that if they did not authorize the DSCC to spend their share, the state party would have to raise and spend this amount. Once the state party understood this, they agreed to let the DSCC spend the state share. I believe we had the Democratic National Committee (DNC) transfer their § 441a(d) authority to us, as well.

17 I started a candidate retreat, at which campaign strategists, pollsters, media experts and election analysts provided a two-day intensive course on fundraising, campaigning, selecting consultants and so forth. We had lists of Democratic political consultants and pollsters they might consider, and we also warned campaigns not to hire those who played both sides of the aisle.

18. While we welcomed calls from all our candidates, we spent nearly all our time working with non-incumbents. Incumbents rarely sought our advice, and often rejected it when we offered.

19. Taking away the limits on coordinated expenditures would result in a fundamental transferal of power to certain individual Senators. In that situation, it would behoove the leadership to raise and control as much money as possible.

20. As I understand it, the national campaign committees now send competent, qualified campaign coordinators into the various States to help candidates, particularly non-incumbents. If the limits on coordinated expenditures are removed, a party committee would be able tell a candidate, "We are going to give you $2 million or $4 million for your Senate race. We are also going to tell you who is going to staff your Senate race. We are going to tell you what to say and what to do. We are going to take control." This would have enormous political and policy implications.

21. Most Senators and Senate candidates have a political philosophy that is unlikely to change dramatically. However, their views on some issues may not be as well established, so this is where money can have a major impact. Contacts from contributors can determine whether a Senator takes an active role on a particular issue, or declines to take an active role.

22. This was readily apparent to me in my work in the 1970s, when I worked with Sen. Edmund Muskie on environmental legislation. When working with 400 or 2,000 page bills, it was commonplace for Members to try

to make what seem to be minor changes that in fact benefit their natural constituency enormously.

23. To the extent that this is corruption, it has always been part of our process. Daniel Webster used to sell votes. This is not going to change. What is going to change, if you have unlimited party expenditures, is that party leaders will be able to say who gets nominated and who gets elected. While I am not sure that the party leaders who control this process would be more beholden to their contributors than is now the case, their power to make things happen would increase.

24. The argument I have always made in favor of Political Action Committees is that you diversify the corruption. Is it better to have a Senator responding to 400 different political action committees with diverse political interests? Or to have one party committee responding only to the party leadership? It scares me to think that you can go out and find a lackey and tell that lackey you are going to give him or her $4 million, which he or she will use to defeat a much better candidate who is still running an old fashioned campaign, and will not accept a $4 million contribution. This would be a very different political environment, with less representation of constituents than is now the case.

25. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ LEON G. BILLINGS
LEON G. BILLINGS

Executed on this 15 day of April, 1997.

Statement of Anthony Corrado

Associate Professor of Government
Colby College

Anthony Corrado
Department of Government
Colby College
Waterville, Maine 04901

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Political parties are essential to the vitality of American democracy. They serve a unique and crucial role in our political system, a role so important that virtually all political scientists and most learned observers would agree with the conclusion drawn over a half-century ago by the noted scholar E. E. Schattschneider that "modern democracy is unthinkable save in terms of the parties" (1942: 1). Party organizations serve as the principal intermediaries between the citizenry and government. They organize large numbers of individuals and political groups into collectives of active political participants, and combine the diverse and diffuse views of individual members into broad-based expressions of political speech. In doing so, they help to translate the needs and desires of the general public into political positions and public policies that form the basis of civic debate and government action.

Parties seek to communicate their views and coalesce diverse interests behind policy positions predominantly through electoral activity. Party organizations concentrate a substantial share of their resources and activities on political campaigning. They play a central role in recruiting candidates, raising campaign funds, communicating information to voters, and encouraging citizens to vote. They develop messages and platforms designed to appeal to broad-based majorities in an effort to win elections and build legislative majorities. These messages provide voters with outlooks that help them comprehend the choices available and structure their decisionmaking. In particular, the parties provide

citizens, especially those who identify themselves as party supporters, with perceptual frameworks and voting cues that help them assess candidates and issues.

Traditionally, parties have also assumed the major responsibility for raising the monies needed to finance election-related activities and candidate campaigns. For most of our history, campaign financing was essentially party financing, since party organizations were responsible for nominating candidates at all levels of government and conducting campaigns on their behalf. For the most part, party committees raised the money and paid for election-related expenses; candidates did not establish their own private campaign organizations or run separate financial operations.

This system of campaign financing changed dramatically in the decades after World War II. The widespread growth of individual candidate campaign organizations and the consequent decline in the role of party organizations led to the development of candidate-based politics in which individual candidates raised their own campaign monies. Party organizations thus became secondary institutions in political finance. While they continued to provide direct assistance to candidates, they were more important as financiers of general party communications and issues development, as well as such crucial party-building and voter participation efforts as grass-roots organizational activity and voter turnout programs.

By the time Congress adopted the Federal Election Campaign Act (FECA) in 1974, the vast majority of political scientists and many journalists were already warning of the need to strengthen political parties. But

the Congress was more concerned with controlling rising campaign costs and equalizing the resources available to candidates. It is also a body of incumbents, who were more interested in establishing methods of candidate-based financing that have benefitted incumbents. As a result, the FECA established a regulatory approach that further reduced the potential influence of party organizations. The law limited party contributions to federal candidates, and placed severe restrictions on the amounts they could spend in coordination with these candidates. It also prohibited party committees from spending money independently on behalf of federal candidates. It therefore reduced the ability of party organizations to finance candidate-related activity, and constrained the role of these committees in communicating directly with the electorate.

In this statement I will examine the role of party funding in the political system, especially the issues raised by the FECA limits on party expenditures. As noted by the Supreme Court in its recent decision in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, the regulations currently imposed on party financial activity raise important First Amendment issues regarding political speech. The rules also raise a number of practical or policy concerns with respect to the ability of political parties to share their views effectively with the electorate and assist party members in their campaigns for elective office. This statement seeks to address these issues by reviewing the characteristics of party organizations and the forms of political party finance, the purpose and role of party expenditures, the question of whether party expenditures can be corruptive of

the political process, and the efficacy of regulatory alternatives with respect to party political speech.

I. The Characteristics of Political Parties

A. Political Parties and Their Roles: An Overview

Political parties are unique institutions in American politics. They are best conceptualized as organized groups with broad-based public memberships that consist of three interrelated social structures: (1) the party organization, which consists of the formal and informal leaders and activists who operate largely through formal party structures, ranging from the national party committees to local precinct committees; (2) the party in government, which consists of the elected and appointed officials who seek government office under the party label, and once in government articulate and work to advance party goals and positions; and (3) the party in the electorate, which consists of those citizens who demonstrate some degree of loyalty to a party, agree with its philosophy and goals, tend to vote habitually for party candidates, and constitute the greater part of a party's political coalition.

This general description of political parties reflects the different purposes parties serve in democratic governance. The chief function parties perform is to contest elections. While other organized interests, such as political action committees and labor unions, support candidates, raise funds, broadcast advertisements, and work to turn out the vote, no other organization plays so central a role in our electoral system as the political party. The preeminent purpose of any party organization is to win elections. To this end, parties run candidates for office, develop campaign messages, raise

funds, conduct polls, provide technical assistance to candidate campaigns, recruit grass-roots volunteers, and work to target and identify party voters and turn them out to vote for party candidates. Their goal in winning elections is to build legislative majorities and help to organize government so that voter preferences can be translated more effectively into government action.

In order to successfully contest elections, parties must appeal to a broad range of interests in society. Given the size of the electorate and the large legislative districts that characterize federal and statewide elections, parties can attract the support needed to win only by building extensive coalitions of diverse interests. Parties therefore unify a wide array of individuals and interest groups in a meaningful way. They work to resolve differences between organized interests or large blocs of voters, and to advance compromise positions that will benefit the party's common goals. Parties thus serve as a unifying force in the pluralistic and at times fragmented civil society in which we live.

The primary way parties generate support is by promoting political discussion and encouraging the development of majority views on public policy issues. In their effort to attract supporters, party organizations express their positions on major policy issues and develop platforms. These platforms often set forth broad agendas for future government action, such as the Democrats' "Great Society" or the Republicans' recent "Contract with America." These party views clarify the choices voters face and help voters make informed decisions. They provide party candidates with common themes and policies that can serve as the

basis for their election campaigns. They serve as the basis for the party's legislative priorities in government. And they help to frame political thinking in a way that makes the ensuing civic debate more accessible and understandable to party supporters.

This role of parties offers a futher benefit: it enhances the accountability and responsibility of the political system. By providing voters with clear choices, parties and their candidates assume a collective obligation to fulfill their commitments to their supporters. Citizens can hold party leaders and officeholders accountable for party views; they know whom to praise or blame for any related government actions. If the party leaders fail to pursue the policies they advocate, they risk losing political support. Parties therefore have a strong incentive to uphold their responsibilities to the electorate.

Parties also serve an important socialization role. That is, they educate citizens about the political process and policy issues, and encourage individuals to participate in the process. Parties advocate political views that voters, or future voters, may adopt in developing their own individual political values and preferences. They thus constitute a means by which individuals can come to understand political activity, comprehend the meaning of political symbols and issue controversies, and learn the value of political action. Party organizations also promote various forms of participation: they give individuals an effective and efficient way to join with others for political action, to contribute time and resources to political campaigns, and otherwise become involved in shared exercises in political speech and electioneering.

Finally, parties help to unify our highly fragmented system of government. Political power is divided between federal, state, and local levels of authority, and is further subdivided by the separation of powers within each level of government, as well as by the diverse constituencies governments seek to serve. Parties work to overcome this decentralized distribution of authority by relying on shared symbols, traditions, and policy positions to create common bonds and perspectives that are shared by party members and elected officials at all levels of government. This common framework generates centripetal force in the political system, which, while not always successful, can produce the cohesion of interests and the legislative majorities that are needed for government to fulfill its purposes. Parties therefore are an essential means of making government more effective.

B. Distinguishing Parties from Other Organized Groups

Political parties are not unique in their desire to mobilize supporters to influence election outcomes or the behavior of those who hold public office. Indeed, most organized groups, especially the larger national political action committees (PACs) or institutions such as corporations or labor unions, have similar objectives with respect to their political activities. In recent years, large PACs and interest groups such as the AFL-CIO have engaged in many of the electoral activities that have traditionally been associated with party committees. For example, PACs and other organized interests raise political money, make contributions to candidates, sponsor independent advertisements that seek to influence election outcomes, and work to

mobilize supporters and encourage them to vote. But despite these common activities, parties remain substantially different from other political groups, and these differences must be respected.

Although organized interest groups and political parties are both engaged in election-related activity, they do not pursue the same objectives in electoral politics. While the general purposes of these disparate types of organizations may coincide and even be comparable at times, a fundamental distinction remains. As one scholar of party organizations has noted:

> Parties run candidates for office and seek control in order to organize the governing process. The parties stand for certain principles, but they use these principles chiefly as a means to attract adherents. Interest groups, contrarily, became involved in the electoral arena *only* to forward their policy preferences. Put simply, rather than taking positions to attract followers, they support candidates who support their positions—or oppose candidates who do not favor their positions. (Maisel, 1987:93, emphasis in original)

Accordingly, most PACs and interest groups exhibit bipartisan behavior. Since they are most concerned with advancing their narrow interest, they provide support to candidates who share their views, regardless of party affiliation. They also tend to favor incumbent legislators over challengers, since incumbents are already in a position to help them with their particular cause.

While parties represent broad interests and diverse coalitions, PACs and other organized political groups

usually represent a single interest or a narrow range of interests. These groups exist primarily to advance a particular view or single legislative goal; their mission is primarily to encourage some government action that will provide the group and its members with a specific economic or other material benefit. In the pursuit of their specific interest, they use a variety of means ranging from public demonstrations and collective bargaining to candidate contributions and direct lobbying of Congress.

Traditionally, these non-party groups have largely relied on their lobbying of legislators and, to a lesser extent, their lobbying of administration officials to achieve their ends. Only after their lobbying role was firmly established did these groups become involved in the electoral process in a meaningful way. Yet, even today, electoral campaigning remains only one of their activities, while, it is still the primary activity of party organizations. An organized political group thus differs from a party in that it maintains some sphere of nonpolitical action and turns to political or electoral action "when political avenues appear to be the best or the only means to achieve its goals" (Beck and Sorauf, 1992:19).

These differences between organized interests and party organizations are especially pronounced in regard to corporations and labor unions. These institutions exist for the economic benefit of their members; their major goal is to help their members materially and economically. Moreover, they have directly benefited from provisions of federal and state law that grant these institutions special privileges and protections, which provide them with economic advantages and are

essential to their ability to amass large aggregations of wealth. Consequently, for most of this century, corporations and labor unions have not been allowed to use their treasury funds in connection with federal election activities, nor may they make direct contributions to federal candidates. Such participation in federal elections is prohibited, since it raises the possibility that these organizations could leverage their economic success in the marketplace into political influence that could be used to secure quid pro quos from legislators or otherwise unduly influence government action. In contrast, party organizations do not own independent economic enterprises or seek to generate wealth from commercial activities. In fact, federal regulations specifically prohibit parties from using commercial means to finance their political activities (11 CFR §100.7[a]).

Another important difference between parties and other political groups is that parties play a fundamental role in the organization of elections. Most states include party signs or symbols on their ballots and arrange ballots based on party affiliation. State laws often give party members a voice in the selection of their party's candidate in direct primaries. In many states, party members also help select local party leaders, such as precinct workers or ward chairs. Party members are therefore more than a group of citizens to be recruited and mobilized on Election Day; they have a recognized status under law that is not shared by other organized political groups.

Finally, for a majority of the electorate, parties serve as important voting cues or symbols. The party affiliation of a candidate is the chief cue on which voters rely when making decisions about candidates or issues.

In this way, parties play a meaningful role in helping voters relate their own values and goals to the options offered in each election. No other organized group in American politics has so effective or extensive an influence in helping to structure electoral decisionmaking. This distinction is in large part a result of the historic and enduring role of political parties. Unlike many PACs or political groups, the major parties have exhibited uncommon stability and endurance. Parties therefore serve as reliable reference points that have stood the test of time, and thus provide form and continuity in the national issue debates and the choices citizens face with each new election.

II. National Political Party Finance

Federal campaign finance laws cover various sources of contributions and different types of spending. In general, the law places limits on the amounts individuals, PACs, political committees, and party committees can contribute to federal candidates, and prohibits corporations and labor unions from giving to federal candidates altogether. The law, however, does not limit most forms of political spending. Candidates can spend unlimited amounts from their personal wealth, and candidate campaign committees are allowed to spend unlimited amounts (except in the case of presidential candidates who accept public financing and thereby accept expenditure caps as a qualifying condition for the public money). PACs are free to spend whatever funds they raise (although any expenditures made on behalf of a candidate, unless they are made independently of the candidate, count as in-kind contributions that are subject to limits). Labor unions and corporations can spend freely to communicate political

information to their members, conduct non-partisan voter mobilization efforts, or make independent expenditures for or against federal candidates.

The federal regulations governing political party finance differ substantially from those applicable to other political committees or sources of funding. As in the case of other contributions to federal candidates, the law sets strict limits on the contributions made and received by political party committees in connection with federal elections. It further limits the amounts parties may spend on behalf of their candidates. But the regulations also acknowledge the distinctive nature of party organizations by setting forth a number of detailed provisions that recognize the close affiliation between a party and its candidates, and the parties' traditional role as organizations devoted to encouraging voter participation. It is therefore appropriate to review the different types of party finance, and to clarify the differences between party coordinated spending and other forms of party spending.

A. Contribution Limits

Under the FECA, national party organizations can receive annual contributions of no more than $20,000 from an individual and $15,000 from a PAC. Any contribution from an individual, however, is subject to the annual limit of $25,000 that is imposed on an individual's aggregate donations to all federal candidates and national party committees, including the national party organizations (Democratic National Committee and Republican National Committee) and the senatorial and congressional campaign committees (National Republican Senatorial Committee, Democratic Senatorial Campaign Committee, National Republican Congressional

Committee, and Democratic Congressional Campaign Committee). The law also prohibits party committees from accepting corporate or labor union contributions to pay for any activities conducted in connection with federal elections.

In addition to restricting contributions *to* party organizations, the law also restricts contributions or other forms of direct assistance *from* party organizations. With respect to direct contributions, each national, congressional, and state party campaign committee can give $5,000 to a House candidate at each stage of the election process, including a primary, runoff, and general election. So the maximum amount that may be contributed, assuming a runoff election in addition to a primary and general election, is $15,000. The parties' national and senatorial campaign committees can give slightly more, a combined total of $17,500, in an election cycle to a Senate candidate. State party committees can contribute an additional $5,000 to a Senate candidate. None of these limits are adjusted for inflation.

B. Coordinated Expenditures (§441a[d])

Parties are also allowed to spend money *on behalf of* individual candidates. These outlays, which are authorized under 2 U.S.C. §441a(d), are commonly known as "coordinated expenditures" because they can be made in direct coordination with a federal candidate or his or her campaign committee. As with direct party contributions to a federal candidate, coordinated expenditures can be made only from funds received under federal contribution limits. These expenditures differ from campaign contributions in that both the party and the candidate share control of them, giving the party

some influence over how these monies are spent. Unlike direct contributions, which are usually monetary donations to a candidate, coordinated expenditures generally take the form of some kind of campaign service paid for by the party, such as polls, television commercials, radio ads, direct mailings, or issue research. Coordinated spending also differs from direct party contributions in that such expenditures can be made only in connection with a federal candidate's general election campaign. While the parties may spend money on behalf of a candidate before the general election period, any monies spent earlier in the election cycle count against the general election limit—there is no separate limit for each stage of the election as is the case with party contributions.

The FECA strictly limits the amount a party committee may spend in coordination with a federal candidate. These ceilings are based on formulas established for each type of election at the federal level. Under the original terms set forth in 1974, national party committees could spend up to $10,000 per candidate in a House general election campaign, except in those states with only one congressional district, in which case the limit was $20,000. In Senate general elections, the limit was the greater amount of $20,000 or two cents times the state's voting-age population, while the presidential election ceiling was simply two cents times the voting age population, or approximately $2.9 million in 1974. Each of these limits was indexed for inflation, so they have increased with each new election cycle. By 1996, they were roughly three times their original amounts: national party committees could spend $12.3 million on behalf of a presidential candidate, or $30,910 for a House candidate ($61,820 in a single-district state), and

from $61,820 in the smallest states, to $1.4 million in California on behalf of a Senate candidate.

State party committees are allowed to spend the same coordinated amounts in House and Senate races as the national party organizations. They are not allowed to spend coordinated amounts on the presidential race. Moreover, the "state" party limit is actually the limit for state *and* local party organizations in a state; the law makes no separate provision for spending by county or local party organizations. But since all state party committees can be considered affiliated committees of the national party organizations, a state party may assign their spending authority to a national party committee, thus in effect doubling the amount a national party committee can spend. These assignments, known as "agency agreements," effectively allow a national party committee to spend the total amount allowed the national and state and local party committees in a particular House or Senate race.

C. Generic Grass-Roots Party Activity and Nonfederal Funding (§431[8][B] and §431[9][B])

The limits on party coordinated spending were first put into effect in the 1976 elections, and questions about the legal status of different types of party funding immediately arose. Traditionally, party organizations had spent significant sums in each election cycle on activities such as grass-roots volunteer organization, voter identification efforts, get-out-the-vote programs, generic party advertising (messages like "Vote Democratic" or "Support Republican Candidates"), and the production of bumper stickers, buttons, and slate cards that might *indirectly benefit* federal candidates, but did not constitute direct assistance to a particular can-

didate. Under the 1974 FECA's original provisions, the costs of many of these activities could be considered in-kind campaign contributions subject to the law. This was especially true of grass-roots campaign materials such as bumper stickers, lawn signs, and slate cards that mentioned particular federal candidates in a listing of party candidates for federal, state, or local office. Party leaders became particularly concerned about materials that included the party's presidential ticket, since the public financing program established by the FECA prevented the parties' nominees from raising additional campaign contributions for the general election period. The FECA therefore had the effect of chilling traditional grass-roots and party-building activities, and reducing the role of party organizations in electoral politics.

In response to these concerns about the diminished role of party organizations, Congress amended the FECA in 1979. In an effort to strengthen political parties and promote grass-roots political activity, the Congress accepted a recommendation made by the Federal Election Commission to ease the restrictions placed on party contributions and expenditures. These provisions, which are codified in §431 of the Act, exempted a narrow set of clearly defined volunteer and grass-roots party building activities from the definitions of "contribution" and "expenditure" set forth in the Act, so that parties could now spend unlimited amounts on voter registration and identification, certain types of campaign material (such as slate cards), and voter turnout programs, without violating the limits imposed on party contributions and expenditures made in connection with a federal election.

This exemption for party-building activities was further expanded by the FEC in a series of advisory opinion rulings, beginning with Advisory Opinion 1978-10, that permitted party committees to allocate the costs of grass-roots party activities in ways that reflected the proportion of federal and nonfederal candidates on the ballot. These rulings allowed national party committees to pay for the federal share of their administrative costs, voter mobilization program costs, and other costs subject to §431 with federally regulated funds, while the nonfederal share (the proportion representing state and local candidates) could be financed with contributions permitted under the relevant state law. The FEC thus allowed national party committees to raise contributions in amounts and from sources that were not permitted under federal contribution limits, since most state laws were more permissive than federal law with respect to contribution limits. This nonfederal funding came to be known as "soft money" in modern campaign finance parlance, since it was not subject to the "hard" contribution limits established by the FECA.

Generic party-building expenditures, or soft money financing (to use the popular terminology), is therefore clearly distinguishable from the party coordinated spending that occurs under §441a(d). Direct contributions to federal candidates or for coordinated expenditures under §441 must be paid for with federally regulated funds—no soft money is allowed. Coordinated expenditures under §441 can be made on behalf of a particular federal candidate; most party expenditures under §431 cannot be made on behalf of a particular federal candidate (the statute does allow mailings or

phone banks conducted by volunteers to advocate the election of a specific candidate).

Thus, the primary purpose for which soft money is used, other than general overhead and administrative expenses and related fundraising costs, is to conduct voter identification and turnout drives that are jointly sponsored by state and local party organizations. These voter mobilization drives are commonly called "coordinated campaigns" since they seek to coordinate the activities of party organizations and candidates to conduct one, centralized party voter turnout program. Instead of having the state committee, local committee, federal candidates, statewide candidates, and local candidates spend funds separately for voter identification and turnout, the party organizations develop one centralized voter turnout effort to mobilize party supporters. This approach reduces the amount of overlap, represents a more efficient use of funds, and reduces the costs incurred by individual candidate campaigns for voter identification and turnout. Such "coordinated campaigns," however, are not to be confused with coordinated expenditures made by party organizations on behalf of specific federal candidates under §441a(d).

In 1996, both national parties also spent a significant amount of soft money for the first time on issue advocacy ads and other communications designed to promote party issue positions. This was the first election cycle in which such communications were a focus of soft money spending. These communications, which did not expressly advocate the election or defeat of particular federal candidates, were used to spread messages regarding the parties' perspectives on the Administration's health care proposal, the 1995 federal

budget debate, President Clinton's first term record, and issues related to the 1996 congressional races. This use of soft money, which has been a source of controversy, is one way parties communicate their views, but it is important to note that it is not related to any coordinated spending done by the parties.

D. Independent Expenditures

Federal regulations adopted under the FECA have always recognized the unique relationship and close affiliation between political parties and their candidates. Accordingly, federal regulations have prohibited national and state party committees from making independent expenditures in connection with the general election campaigns of federal candidates (11 CFR §110.7). But the Supreme Court's 1996 ruling in *Colorado Republican Federal Campaign Committee v. FEC* (116 S. Ct. 2309) concluded that political parties can make independent expenditures on behalf of candidates in congressional races in accordance with their First Amendment right of free speech. Consequently, party senatorial campaign committees and some state party committees established legally separate political operations during the general election campaign period to make independent expenditures, mostly on behalf of Senate candidates. Overall, these committees combined to spend $11.5 million on independent expenditures during the short period available to them before the 1996 elections were held.

As this brief review demonstrates, the rules governing political party financial activity are complex. Because parties are involved in almost every aspect of the elections process and share a unique association with federal candidates, the rules must make provision

for different types of activity to accommodate the parties' diverse functions. It is therefore important, when speaking about party finance, to distinguish the type of funding involved and the particular issues associated with that form of funding.

III. The Role of Party Coordinated Expenditures

In *Colorado Republican Federal Campaign Committee v. FEC*, the Court expressed specific interest in party coordinated expenditures and in the question of whether it is constitutionally permissible to limit such spending. This question is best answered by first examining how parties spend funds in coordination with federal candidates, and summarizing the effects of these expenditures in federal contests.

As noted in the review of party financing above, coordinated expenditures are the only form of party spending limited under the FECA. These ceilings were established in 1974, when the FECA established a regulatory regime that limited all forms of political spending in an effort to curb rising campaign costs and equalize the resources available to candidates. These limits on party spending ensured that the ceilings placed on candidate spending would be effective.

In 1976, the Supreme Court's decision in *Buckley v. Valeo* struck down most of the spending limits that the party coordinated spending limits were designed to support. The Court ruled that limits on congressional campaign spending were unconstitutional, since they limited political speech without serving the compelling state interest of preventing corruption or the appearance of corruption. On the same grounds, the Court overruled the limits that had been set on independent

expenditures and on the right of a candidate to spend personal funds on his or her own campaign for federal office. However, the limits the FECA imposed on party coordinated expenditures were not challenged in this case. They therefore remained in effect after the *Buckley* decision, even though there was no evidence to suggest that these limits were needed to protect the integrity of the electoral process. The result was an imbalance in the campaign finance system—while wealthy candidates using their own resources could spend unlimited amounts on their campaigns, and well-financed incumbents could spend unlimited amounts, and PACs and other groups or individuals could spend unlimited amounts independently in federal elections, party committees were restricted in the amounts they could spend to assist their candidates.

Not only did Congress limit the amounts parties could spend in coordination with their candidates, but they also set the ceilings at unrealistically low levels. The ceilings were not designed to ensure effective or meaningful political communication. They were set at levels—2 cents times the voting-age population with adjustments for inflation—that virtually guaranteed that any communication with party members on behalf of candidates would be severely limited. At this level of funding, party committees could not afford to pay the postage on one letter to each eligible voter in a district or state, never mind the cost of the stationary and printing needed to produce the letter. In fact, the limits were so low that a party committee could not even send a letter to each party supporter in a state or district; that is, it could not pay to send one letter to its own members. In contrast, congressional incumbents in 1974 were spending $30.5 million posting franked mail

to constituents at an average cost of about 10 cents per piece of mail. By 1988, congressional incumbents were spending about $82.2 million on franked mail, at an average mailing expense of about 14 cents. The coordinated spending allowed party organizations, however, had only increased to about 5 cents for each person of voting age.

The coordinated spending limits are particularly restrictive because they are adjusted only for inflation and voting-age population. Neither of these measures adequately represents the real changes in the costs of campaigns. The costs of campaign services and communications, such as polling, television advertising, direct mail services, and travel expenses, have increased at a rate significantly greater than the Consumer Price Index, which is used to adjust party spending limits. For example, between 1976 and 1980, the Consumer Price Index rose about 40 percent, but the cost of such basic items as mass mailings, television commercials, and air travel grew by 50, 100, and 300 percent. Between 1976 and 1982, the McCann-Erickson index to media advertising costs, which includes all advertising mediums, rose at a rate that was 14 percent greater than inflation. Such increases led FEC Commissioner Lee Ann Elliott to observe in 1992 that "in truth, campaign costs don't go up at marketbasket inflation; instead of going up about four or five percent every year, they go up *ten*, *twelve*, *fifteen* percent every year" (Elliott, 1992:302, emphasis in original).

As for voting-age population, this adjustment is only applied to a party's spending limit in senate elections and those states with a single congressional district. As noted above (see section II.b), congressional races in

multi-district states are subject to a limit originally set at $10,000, which is only adjusted for inflation, even though the mean population of a congressional district has grown from approximately 470,000 when the FECA was adopted to more than 572,000 in 1990. This disparity in the treatment of congressional district spending limits has created significant variations in the amounts a party may spend in different congressional districts. For example, between 1976 and 1996 the amount a party committee could spend in most congressional districts (those in multi-district states) rose to an inflation-adjusted $30,910, with no accommodation for the average growth in a district's size. In a single-district state like Wyoming, however, a party could spend up to $61,820, the same amount that could be spent on behalf of a senate candidate, or more than twice the amount permitted in other congressional districts. Thus, in 1996, a party could spend no more than $30,910 to help a congressional candidate in New York, where congressional districts have an average voting-age population of 438,700, but could spend $61,820 to help a candidate in Wyoming, where the voting-age population totals approximately 344,000. The formula for determining party spending limits also creates inequities between single-district states. For example, in 1996, a party could spend the same amount in Wyoming and Montana, even though Montana's voting-age population (634,000) is almost twice as large.

Despite the constraints imposed by the inadequacies of the limits, party organizations recognize the value of coordinated spending and devote significant sums of money to this activity. On average, since 1986, the Democrats have dedicated about 13 percent of their total federal spending to coordinated spending. The

Republicans, who in recent elections have raised about twice as much federal money as the Democrats, have disbursed about 9 percent of their total federal spending in a coordinated manner. Since 1990, the Democratic and Republican parties have each spent at least $20 million to $30 million per election on coordinated expenditures. This represents a substantial increase from the levels of the early 1980s. For example, the Democrats spent $4.9 million on coordinated expenditures in 1980 and $3.3 million in 1982; the Republicans spent $12.4 million and $14.3 million, respectively. By contrast, the major parties spend only 1-2 percent of their federal funds on direct contributions to candidates, or an average in recent elections of $2 million to $3.5 million per election. (For a summary of national party federal financial activity, see Table 1.)

Generally, the four national congressional committees or "Hill committees" (the Democratic Senatorial Campaign Committee [DSCC], Democratic Congressional Campaign Committee [DCCC], National Republican Senatorial Committee [NRSC], and National Republican Congressional Committee [NRCC]) take the lead in working with state party committees to effectuate coordinated expenditures made in connection with congressional elections. The national and state party committees work together to determine how best to allocate their resources to provide the greatest benefit to their candidates. In some instances, the national committees work with state organizations to combine their spending authority; in other cases, they offer guidance to state parties engaged in their own activities.

As noted in Table 3, coordinated expenditures are a major activity of national and state and local party committees in both the Democratic and Republican parties. The total amounts spent on such activity have increased substantially in recent election cycles, with the largest share financed by the national party committees. While they lack the resources available to their national counterparts, state and local parties also play an important role in effectuating coordinated activity. These committees have spent significant sums on coordinated expenditures, especially when considered in relation to their total election-related spending. They have also demonstrated a growing capacity to assist their candidates in this way, as indicated by the increasingly large sums devoted to such spending in the last three election cycles. In the 1992 and 1994 election cycles, Republican state committees spent an average of $1 million on behalf of federal candidates, while Democratic committees spent an average of over $1.4 million.

The hard monies that are used for coordinated expenditures are generated through ongoing fundraising operations that include direct mail solicitations, telemarketing efforts, party fundraisers, an annual congressional dinner, and the solicitation of individual donors. The vast majority of the monies used for coordinated expenditures are generated through contributions of relatively small amounts from individual donors. In fact, most of the hard money raised by party committees for use in connection with federal elections is received in contributions that fall far below the maximum allowable amounts. Because party contributions are subject to the annual aggregate $25,000 ceiling on individual giving, very few donors give

amounts that are even close to the legal maximum. Of the more than one million individuals who donate money to national party committees each election cycle, there are probably fewer than a thousand donors, both parties included, who give anywhere near the maximum individual contribution of $20,000 in any given election cycle. State and local party committees are subject to even smaller hard money contribution limits. These committees may accept no more than $5,000 total from an individual for activities conducted on behalf of federal candidates.

Decisions about coordinated spending are made by party leaders and staff members, working in conjunction with candidates. The chairs, vice chairs, and members of the Hill committees are members of Congress who are selected by their colleagues in the House and Senate. In addition, the committees have full-time staffs: in 1996, the DSCC had 38 staff members, the NRCC and DCCC 64 each, and the NRSC 150. The elected members of the committee essentially act as a board of directors, establishing priorities and assisting in the recruitment of candidates, fundraising, and other activities. The staff members oversee the daily operations and play a major role in formulating party strategies and implementing those strategies.

The administrative apparatus needed to effectuate coordinated expenditures is therefore very expensive to operate. During the 1996 election cycle, roughly 50 percent of the DCCC's funds and 45 percent of the DSCC's monies were used to finance staff salaries, computers, media studios, voter lists, fundraising programs, loan repayments, and other overhead costs. The NRCC and NRSC spent even more on these activities,

committing approximately 55 percent and 48 percent of their funds to them.

A. Enhancing Electoral Competition

The national party Hill committees have a common overriding goal: they seek to maximize the number of seats their party holds in Congress. Party leaders and committee staffs therefore try to make the most efficient and effective use of their available resources to win elections. While the membership of these committees would suggest that they would favor incumbents in distributing their resources, since the members are sitting members of the House and Senate, the reality is just the opposite. Instead of focusing on incumbents, party committees focus on candidates in close contests or marginal districts where party assistance might make a difference in whether the party candidate wins or loses the election. They also concentrate on challengers who can wage competitive campaigns against an entrenched incumbents of the opposite party. However, federal law hamstrings these efforts.

Party resources are not a major source of funding for incumbents. The bulk of party contributions and expenditures are devoted to candidates for open seats (races where an incumbent is not seeking reelection or loses a primary election and its therefore not a candidate in the general election), and challengers who are running in competitive contests or who might become competitive with party assistance. Sometimes the parties do provide some assistance to incumbents because they have the resources available to do so. For example, in 1984 the NRCC had sufficient funds to give all of its incumbents the maximum legal direct con-

tribution, regardless of the competitiveness of their contests. In recent elections, the NRSC has usually given the maximum legal contribution to all of its candidates, and the DSCC has given the maximum to most of its candidates because they had the resources to do so. But in most of these instances, the party organizations did not provide incumbents with further assistance by making significant coordinated expenditures on their behalf.

National political and economic conditions can also dictate a slightly greater distribution of resources to incumbents. According to Paul Herrnson, an authority on party spending in congressional elections, when national conditions do not favor the president's party, the in-party committees take a more "defensive" posture towards incumbents, and the out-party committees use more of their resources to help non-incumbents. When national conditions favor the president's party, the patterns are reversed, with the in-party committees giving more to non-incumbents and the out-party spending more to support incumbents. But even when parties support incumbents, it usually helps mainly those who are in jeopardy of losing their seats (Herrnson, 1995:81).

That party committees focus their spending on non-incumbents who most need their support can be determined by examining the disclosure reports on coordinated spending issued by the Federal Election Commission. In order to determine the amounts of money given by the parties to different types of candidates (incumbents, challengers, or those seeking open seats), I aggregated the amounts spent by committees of each major party in coordination with the general

election candidates in House and Senate contests during the 1996 general election, as disclosed in the itemized candidate-by-candidate listing released by the Federal Election Commission in its March 1997 press release on party spending. (See Federal Election Commission 1997a, pages 12-34.) I then determined the total and average amounts spent by each party on behalf of incumbents, challengers, and open seat candidates in each type of federal election (House, Senate, or President). The results of this analysis follow.

While there are times when an incumbent in a safe seat may receive party resources, these candidates account for relatively little of the coordinated spending done by party committees on behalf of their candidates. The majority of coordinated expenditures are made to help non-incumbents. Indeed, the general spending patterns that characterized the 1996 election cycle are fairly typical of the patterns evident in recent years (see Table 4).

Overall, Democratic party committees disbursed more than $22 million on coordinated expenditures in the 1996 election cycle, as compared to more than $30 million for the Republicans. The Democrats spent $6.7 million in coordination with their presidential candidate, $8.6 million in coordination with 28 Senate candidates, and $7 million in coordination with 316 House candidates. The Republicans spent $11.7 million in coordination with their presidential candidate, around $11 million in 32 Senate races, and about $8 million in 156 House races.

In both parties in 1996, the majority of party coordinated expenditures were made on behalf of non-incumbents. The Democrats devoted 85 percent of

their total coordinated expenditures in Senate races to challengers (31 percent) and open seat candidates (54 percent). In House races, 80 percent was spent on behalf of non-incumbents, with challengers (56 percent) receiving more than twice the share that went to open seat candidates (24 percent). Almost all of the money spent on behalf of incumbents—15 percent in Senate races and 20 percent in House races—went to incumbents who were in jeopardy of losing their seats.

The average dollar amounts spent by Democratic party committees on behalf of candidates also significantly favored non-incumbents. In House races, party coordinated spending averaged $39, 852 on behalf of open seat candidates, $26,065 on behalf of challengers, and $11,595 on behalf of incumbents. In Senate races, open seats received an average of $357,117 in spending, challengers $263,880 in spending, and incumbents $266,116. Spending on behalf of senate incumbents was slightly higher than the average spent on challengers due to the small number of incumbents seeking reelection, all of whom were involved in highly competitive contests.

The Republicans' coordinated activity also favored non-incumbents. The Republican committees, however, spent more than the Democrats defending incumbents because of the unusually large number of incumbents involved in close races, especially among the large freshman class in the House, most of whom won in 1994 with 55 percent of the vote or less. Even with this unusually large number of threatened incumbents, the Senate and House committees each disbursed close to two-thirds of their coordinated funds on races involving non-incumbents. In Senate races, 63 percent of

coordinated expenditures were made on behalf of non-incumbents, with challengers receiving 21 percent of the total amount expended and open seat candidates, 42 percent. In the House elections, where 63 percent of the funds also went to non-incumbents, challengers received 34 percent of the coordinated money, while open seat candidates received 29 percent.

The average dollar amounts spent on behalf of candidates by Republican party committees were more balanced than the comparable sums for Democrats, but still favored non-incumbents, albeit only by small differences in some instances. In House races, Republican committee disbursed an average of $56,030 on behalf of candidates in open seat races, $52,683 for challengers, and $47,017 for incumbents. In Senate races, open seat spending once again led the way, with these candidates receiving an average of $359,874, as compared to $335,758 for challengers and $335,289 for incumbents.

The 1996 allocations are similar to those in previous cycles. In 1992, for example, national party committees allocated a majority of their funds to non-incumbents. The Democratic committees allocated 76 percent of the monies spent on Senate races to challengers (47 percent) and open seat candidates (29 percent), while 56 percent of the funds disbursed in connection with House races went to challengers (36 percent) and open seat candidates (20 percent). On the Republican side, 53 percent of the monies allocated for Senate races went to challengers (24 percent) and open seat candidates (29 percent), while 75 percent of the monies disbursed in connection with House races went to challengers (44 percent) and open seat candidates (31 percent) (See

Herrnson, 1995:86, figures include contributions and coordinated expenditures).

That most of the monies spent in coordination with candidates are targeted on non-incumbents and close races makes sense, given the purpose these party funds serve in the electoral process. Party committees rely on their coordinated expenditures to help the maximum number of candidates win election. That is, they disburse these funds in an effort to help their candidates, especially challengers, gain access to the resources they need to wage succesful campaigns. Party funding thus helps to make elections more competitive. It enhances the ability of non-incumbents to contest elections, increase their name recognition, and make their views known to the electorate. In this way, parties help to improve the choices available to electorate and enhance the vitality of the electoral process.

Party coordinated expenditures are especially important because parties are the only source of funding that mostly benefits non-incumbents. As political scientists have noted for years, one of the major problems in the campaign finance system is the inability of challengers to raise the monies needed to wage viable campaigns. For challengers who are not wealthy and capable of financing a campaign from their personal resources, there are only three sources of campaign funding available to them under the FECA: contributions from individuals, donations from PACs, or money from political parties. Most of the individual gifts go to incumbents, who have well-established donor bases and the advantage of incumbency. And the vast majority of PAC contributions also go to incumbents. In fact, in recent elections, PACs have given an average of more

than 70 percent of their campaign contributions to incumbents, as opposed to only 10-15 percent to challengers (the balance, about 18 percent, goes to open seat races). In 1996, for example, PACs gave $146.4 million to incumbents, compared to $31.6 million to their challengers. In 1994, the difference was $137.2 million to $19 million; in 1992, $135.3 million to $22.9 million; and in 1990, $125.8 million to $16.2 million.

Challengers therefore look to party committees for assistance in overcoming the significant financial disadvantages they experience in most elections. Party money is the only major source of funds in the political system that challengers can rely on to help counter the overwhelming resource advantage incumbents enjoy as a result of their greater success in fundraising, especially in soliciting PAC contributions. It also helps to counter the advantage incumbents enjoy as a result of the privileges that accompany their position in government, such as the franking privilege .

The problem facing parties, however, is that under the current campaign finance laws, they are strictly limited in the amount they can spend in coordination with their candidates. As a result, although they can provide some assistance to party candidates challenging incumbents, they cannot hope to match the advantages incumbents receive from PACs. For example, in 1996, PACs gave an average of over $950,000 to Senate incumbents, more than three times the average amount they gave Senate challengers, and far more than the average amount spent by party committees on challengers' behalf. PACs gave an average of close to $300,000 to House incumbents, which was more than five times the amount given challengers and approxi-

mately five times more than the amount that national and state parties *combined* were legally allowed to spend ($61,820) on behalf of their challengers.

The current limits on party expenditures thus reduce the level of electoral competition by constraining parties in their ability to make their candidates more competitive. In many instances, parties would be willing to spend more to assist their candidates, but are prevented from doing so because of federal ceilings. In 1996, for example, the Democratic and Republican congressional campaign committees essentially spent the maximum allowable coordinated amount—$61,820 total for party committees at all levels of government—in approximately 150 House races. That is, the committees spent 95 percent or more of the limit in races involving 103 non-incumbents, including 60 candidates challenging incumbents, and 44 incumbents. All of these incumbents were involved in close races; all except for two (Republicans Hilleary of Tennessee and Christensen of Nebraska, who finished with 58 and 56 percent of the general election vote, respectively) received 55 percent of the vote or less in the general election.

The limits had an even greater effect in restraining spending in Senate races. In 1996, there were 68 major party candidates seeking election for 34 seats. Of these 68 candidates, party committees disbursed the maximum amount in coordinated expenditures, in 41 cases, or 60 percent. Republican committees reached the limit in 25 races involving 12 open seat candidates, 5 challengers, and 8 incumbents. Democrats reached the limit in 16 races involving 10 open seat candidates, 5 challengers, and 1 incumbent. That the party committees are more apt to reach the limit in Senate races is understandable, since in most instances the quality of the candidates who seek election to the Senate tends to make these highly competitive races. Moreover, in these races candidates need to communicate their views with statewide electorates, rather than the voters in a single congressional district, and given the costs of communicating with such a large audience, taken together with the inadequacy of the coordinated spending limits with respect to the real costs of campaigning, it is not surprising that the ceiling is quickly achieved in most cases.

B. Facilitating Political Speech

How do parties disburse the monies they are allowed to spend in coordination with candidates under §441a(d)? In what specific ways do they seek to help their candidates?

Party committees offer candidates a wide range of election-related services, including organizational consulting, issue research, polling, mail services, and media production and advertising assistance. Generally, party committee leaders and staff members work with candidates and their campaign staffs to provide them with the resources and type of assistance they need most. That is, the party works with each candidate to determine how coordinated funds can best be spent to improve that candidate's prospect of winning election. Parties therefore pay for different campaign services on behalf of different candidates, depending on a candidate's particular situation and needs. But what candidates need most, especially non-incumbents, is help in broadcasting their message and communicating

their views so that they are known by the voters who will cast ballots on Election Day.

Party coordinated funding is used almost exclusively to help candidates communicate more effectively with the public. Parties and candidates both know that voter communication is the key to winning elections. Candidates must develop a message that is meaningful to voters and have the resources needed to present that message to the electorate. To have their voices heard in modern election campaigns, candidates rely on television or radio advertising, or direct mail, the latter being the preferred medium for many congressional candidates, since broadcast vehicles like television or radio usually have audiences that span more than one congressional district and are therefore less efficient and more costly means of communicating than targeted mail to likely voters. But all of these methods of communicating are expensive, particularly given the fact that Senate and congressional candidates must disseminate their views on a number of different issues during the course of a campaign.

Non-incumbents, particularly challengers running against well-known incumbents, often find it difficult to raise the funds needed to make their views known to the electorate and gain the name recognition among the voters that is required for a viable or winning campaign. Party organizations therefore try as much as possible to promote their candidates' views and enhance their ability to speak with voters. In doing so, a party fulfills one of its principle objectives, since the main way a party's ideology and policy perspectives become known to the electorate, and thus the primary way it generates public support, is through the speech

of its candidates. Parties therefore have a keen interest in promoting the widespread airing of their candidates' views.

The national party committees assist candidates with campaign communications in a number of ways. The predominant approach is to provide candidates with the funding needed to broadcast their messages or post letters to selected voters within their districts. But this is not the only means by which party committees support their candidates' speech. Both the DCCC and the NRCC have state-of-the-art television and radio production facilities on their premises, which are used to give candidates technical and editorial assistance in producing television and radio ads. The committees also have satellite capabilities that allow candidates to beam television communications back to their districts and interact "live" with voters.

One way the parties use these facilities is to produce "generic" ads each election cycle that include general party messages and themes, which can be customized for particular candidates by incorporating a candidate's name, picture, and voice. These generic ads are normally used by challengers who lack the resources to hire a media consulting firm or hope to reduce their media production costs by using one of these party ads.

Candidates can also use the party media production facilities to make ads for themselves. Both congressional committees have staff members available to offer technical and editorial advice, particularly guidance in identifying major themes, drafting scripts, and producing ads. The senate committees, the DSCC and NRSC, take a less active role in developing candidate communications, since senate candidates usually have the

experience and funding needed to develop public relations strategies, in addition to media consultants who handle most of their ad production. However, these committees still play a role in their candidates' campaign communications. The NSRC provides its clientele with radio actuality services that enable candidates to record a campaign message that local stations can access by dialing a toll-free number. The NRSC and DSCC also sponsor Internet sites that distribute general information about their Senate contenders.

The extent to which party committees assist candidates with their campaign speech and the emphasis placed on promoting candidate views when allocating coordinated expenditures under §441a(d) can be determined by examining the disclosure reports filed by the party committees and reported by the Federal Election Commission. Under federal disclosure requirements, each party committee must provide an itemized listing of its coordinated expenditures, noting the candidate on whose behalf an expenditure is made, the payee, the amount, and the purpose of the expenditure. These itemized disbursements are reported in the monthly reports filed by the party committees on Schedule F and line 25 of the committees' summary reports. By reviewing each of these expenditures, the amounts spent on media, mail, research, polling, and other particulars can be easily determined.

Parties use their coordinated expenditures under §441a(d) to help their candidates communicate with voters. Over 90 percent of the monies spent by national party committees on behalf of their candidates is spent on political communication. And most of the other 10 percent is spent on issues research and polling, which is

used to help candidates develop and target their campaign messages. So this spending is also directly related to political communication.

For example, in 1992 the NRCC and the Republican National Committee (RNC) spent a combined total of almost $6 million in coordination with Republican House candidates. Of this total, at least $5.5 million, or over 91 percent, was spent to help candidates share their views with the voters, either by supporting broadcast via electronic media or by paying the costs of direct mail. The NRCC distributed roughly $1.7 million in electronic media services (television and radio) to Republican House candidates, while the Republican National Committee (RNC) spent an additional $613,000. The NRCC produced 188 television advertisements for 45 candidates, 23 of whom were incumbents and 22 challenger or open seat candidates. Two-thirds of these ads were created specifically for individual candidates, with the remainder consisting of generic party ads that were customized for individual candidates. The committee also produced radio ads for 45 House members and 44 nonincumbents. In addition, the party spent $3.2 million on direct mail advertising in coordination with candidates.

The DCCC distributed approximately $4.1 million in §441a(d) funds to its 1992 candidates, approximately 94 percent of which was used for candidate communications. The committee disbursed roughly $3.2 million worth of television and radio services to a large number of candidates. Over 170 House members and 70 nonincumbents used the Democrats' Harriman Communications Center to record and edit their television commercials. Others used the committee's facilities to

record radio advertisements. In addition, the Democrats provided their candidates with $725,000 in direct mail services.

The Senate committees spent significantly more than House committees on behalf of their 1992 candidates, but the shares devoted to direct candidate communications were roughly the same, with at least 9 out of every 10 dollars spent in coordination with a candidate being used to distribute candidate messages to the voters. The DSCC disbursed $9.6 million of its $11.2 million in total coordinated spending on electronic media services for Democratic candidates. It spent an additional $390,000 on direct mail services for Senate candidates. The NRSC dedicated almost 97 percent of its §441a(d) spending to direct candidate communications. It disbursed nearly $15 million of its $16.5 million in coordinated expenditures to television and radio advertising for Senate candidates, and another $1.1 million on direct mail.

Similar patterns characterized the parties' coordinated expenditure distributions in 1996. The NRCC, for example, spent a total of $7.3 million. Of this amount, approximately 99 percent was spent on media, mail, and telephone services used to help candidates communicate with voters. The committee disbursed approximately $4.2 million on media services. It spent an additional $3 million on direct mail, and over $150,000 on telephone communications. The DSCC spent about $8.4 million on behalf of Democratic Senate candidates, 90 percent of which was used for media advertising and mail. The Democrats spent $7 million on media advertising, and almost $500,000 on mail. Most of the remaining funds were used for polling.

The major exception to the general pattern of recent elections was the allocation of resources by the DCCC in 1996. This committee spent $7 million on behalf of congressional candidates, with 70 percent of this amount dedicated to direct candidate communications and the remaining share spent almost exclusively on polling and issues research. The DCCC spent almost $4.4 million on media services. The committee gave virtually every Democratic House candidate $20,000 in credits that could be redeemed at its Harriman Communications Center, and its staff estimated that roughly 70 percent of their candidates redeemed them. The party committee also produced 12 different generic ads that were essentially used by non-incumbents who could not afford to hire a media consultant. The DCCC also spent $512,000 on mail and telephone services.

The reason why the Democrats disbursed a smaller, although still very significant, share of their coordinated expenditures on direct candidate communications is because they spent a substantial amount on issues research and polling to help their candidates develop their messages. As the minority party in Congress, the Democrats fielded a larger number of challengers, many of whom faced first-term incumbents who had received less than 55 percent of the vote in 1994. The Democrats therefore spent over 20 percent of their coordinated monies working with candidates to provide them with issues research, voting record information, and polling data to help them define the major issues in the race and identify messages that could be used to frame their candidacies. Much of this money was disbursed in the summer and early September, when many challengers were organizing their general election campaigns.

Candidates, especially non-incumbents, place great value on coordinated party funding, since it gives them opportunities to spread their message that they would not be able to afford otherwise. But the limits on party spending make it impossible for these committees to pay for a very extensive or intensive amount of campaign speech. While the parties spend substantial sums on coordinated expenditures under §441a(d), almost all of which goes toward political communications, the assistance they provide to individual candidates is relatively minor. As noted earlier, even if a party takes advantage of bulk mail and reduced postal rates, and spends the maximum amount allowed the national and state and local committees in a given congressional district, the party can at best pay the postage for one mailing to a targeted group of voters within a district. It is not allowed to pay the production expenses and mailing costs of just one letter to the voters in a district.

Nor can the party finance a significant amount of media broadcast time. Generally, the 441a(d) limits prevent the parties from purchasing the broadcast time needed to air more than one or two ads effectively on a statewide basis. For example, in 1996, the national party organizations were allowed to spend $168,707 in South Carolina under the §441a(d) ceiling. The estimated cost to air one thirty-second campaign ad in South Carolina on a statewide basis with enough frequency that it would penetrate the viewing audience and have its message understood by voters was approximately $186,000. Similarly, in Georgia, the estimated cost of a statewide media buy for one ad was $280,000 and the state spending limit was $326,224; in Colorado, $123,750 against a limit of $170,932; and in

Massachusetts, over $250,000 against a limit of $286,968. Party committees are therefore usually forced to be selective in financing candidate advertising, paying for the purchase of time only in selected markets and for short periods of time. Often they must decide whether to finance early media broadcasts in hopes of giving a candidate, especially nonincumbents, a boost by providing some early voter attention and momentum. Or they must choose an alternative strategy and finance some late media broadcasts in the final week or two of a campaign in hopes of giving candidates greater visibility in the crucial final stages of an election. Given the constraints of the law, parties usually cannot do both.

The limits on party coordinated spending thus force candidates and parties alike to rely on other sources of revenue to finance their campaigns. These limits make PAC money more attractive to candidates, since candidates can receive as much PAC money as they can raise, although they can take no more than $10,000 ($5,000 in the primary election and $5,000 in the general election) from any one PAC. These limits also place many candidates at a serious competitive disadvantage, especially challengers facing a well-financed incumbent or a candidate facing a wealthy opponent who is financing his or her campaign from unlimited personal funds, since they cannot look to the party for the supplemental assistance they may need to communicate effectively with voters in a campaign environment in which they are being outspent significantly by their well-financed opponent.

The limit on party spending also forces party committees to seek alternative means of assisting can-

didates in races where the coordinated spending limit has already been reached. One means available is to increase the amount spent in a district or state under §431 of the Act. This would allow parties to spend monies on voter turnout and general party campaign materials such as slate cards and sample ballots, but this is an inferior means of communicating with voters as compared to direct advocacy of a candidate through broadcast advertising or broad-based mailings. Moreover, any spending under §431 can be financed in part with soft money funds that are not subject to federal contribution limits. The choice of this alternative would thus encourage parties to raise more soft money, which is subject to less effective disclosure and no contribution limits.

The other alternative available to parties would be to shift the allocation of their hard money resources from coordinated expenditures made in concert with their candidates to independent expenditures made without any coordination with their candidates. But this too is a less desirable alternative. As discussed in the next section, this alternative would allow parties to freely advocate the election or defeat of particular candidates, but only at the cost of increased party fundraising demands, a weakening of the link between parties and their candidates, and the possibility of voter confusion and a reduced level of accountability in the political system.

C. Coordinated Expenditures versus Independent Expenditures

The Supreme Court's 1996 ruling in *Colorado Republican Federal Campaign Committee v. Federal Election Commission* has offered political parties an alternative means of communicating with the electorate about their candidates: they can spend money independently. Under the Court's ruling, parties can make independent expenditures without having these disbursements count against federal contribution limits or coordinated spending ceilings. Parties can therefore avoid the restrictions imposed on coordinated spending by spending monies independently in support of their candidates. By undertaking independent expenditures, parties can expressly advocate the election of their candidates for federal office and freely communicate with the electorate without restrictions on their right to free speech. But this approach constitutes a much less effective means of communicating with voters, and it would increase the fundraising demands on party organizations, while at the same time reducing the level of accountability and responsiveness in the electoral process.

In 1996, the parties responded to the Supreme Court's ruling by making independent expenditures in federal election contests for the first time. Prior to the Court's ruling, federal campaign finance regulations had prevented parties from spending funds independently of their candidates to expressly advocate their election or the defeat of their opponents. Questions concerning the legal procedures and arrangements needed to make independent expenditures in the absence of promulgated regulations led the parties to proceed with caution in 1996. In fact, the Democrats spent most of August and September seeking clarification of the law, and therefore did not establish an independent expenditures operation until the final weeks of the campaign. However, despite the uncertainty and short time period available between the issuing of the

Court's opinion and Election Day, the parties still managed to spend $11.5 million independently, with the Republicans spending $10 million as compared to $1.5 million for the Democrats.

In 1996, almost all of the monies spent independently by party committees were spent in Senate races, primarily open seat races in which the party had already spent the maximum legal amount in coordinated spending. Of the $11.5 million total for both parties, over $8.3 million was spent in Senate open seat contests and only about $118,000 was spent in House races. Given the unrealistically low ceilings on coordinated spending and the large number of races in which parties reach the limit, it is likely that parties will allocate an increasing amount of money to independent expenditure efforts in the future. And in pursuing this option, it is inevitable that candidates and parties alike will face legal a range of legal questions that will have to be resolved.

The problem with independent expenditures is that they are less efficient and effective than coordinated expenditures as a means of communicating with voters. First, in order to ensure that any independent expenditures made by a party are independent of other party activities, party organizations in 1996 each established a legally separate entity that was solely responsible for making independent expenditures. Each party had to rent and furnish an office, hire staff, and pay other administrative costs. They had to engage additional consulting services, and duplicate many of the functions already being undertaken by other party offices. The parties therefore had to go through a cumbersome, complicated, and time-consuming procedure in order to

communicate their views. They also had to incur significant additional administrative and overhead expenses in order to pursue their right to free speech. While specific estimates on the costs incurred in 1996 are not readily available, the administrative and overhead expenses associated with a separate party committee operation are substantial. As noted earlier (section III), the national party committees' Hill committees spend an average of 45 to 50 percent of their budgets on administrative and overhead expenses.

Second, independent expenditures do not qualify for the lowest unit rates on the purchase of broadcasting time. Party coordinated expenditures do. Consequently, parties must spend more, in most cases almost twice as much more, for the same ad or message if it is financed independently instead of in a coordinated manner as allowed under §441a(d). Parties therefore have to spend more money for the same quantity of speech when they are speaking independently. A regulatory structure that encourages party committees to engage in independent expenditures thus increases the fundraising burdens on parties, since it puts them in a position where they have to spend more money to communicate with voters than they would if their speech was considered a coordinated expenditure.

Third, when spending money independently, parties are required to separate themselves from their candidates, at least with respect to any election activity associated with the independent expenditures. This is a less efficient and effective means of communicating with the electorate than under §441a(d). The best way for a party to help a candidate communicate with voters and develop an effective message is to work together in

a coordinated manner. Such collaboration is not allowed with independent expenditures.

A shift towards independent expenditures would be particularly undesirable because independent spending reduces the level of accountability in the system and is confusing to voters. Independent expenditures must be made without any coordination with candidates. The candidates they are intended to help, therefore, do not have to assume any responsibility for them. This is particularly true in the case of independent expenditures made against an opposing candidate. For example, if the Democratic party sponsors a message or ad against a Republican candidate that is not accurate or is controversial, the Democratic candidate can disavow association with the ad, claiming that he or she had no knowledge of the ad and therefore is not accountable for it. Such arguments, while based on legal reality, are confusing to voters, who view candidates as intimately connected with their parties, and don't understand the legal distinctions between coordinated ads, independent ads, and candidate-sponsored ads. With coordinated expenditures, party spending is more closely related to the candidates who benefit from the activity, and the coordination between the party and candidates makes it easier to hold candidates responsible for any spending.

Coordinated spending therefore reflects a relationship between party and candidate that fits more closely with the way voters think about the election process. Electoral regulations should promote this relationship between parties and candidates, because it is a meaningful one for voters. Even though the share of the electorate that identifies with a political party has

declined in recent years, party identification is still the most important factor in helping voters shape their views of candidates. Party identification is a cue that helps voters distinguish candidates, frame policy choices, and make decisions on Election Day. Thus, by strengthening the ties between parties and candidates, campaign finance regulations can help improve the accountability of the electoral process and make it easier for voters to hold parties and candidates responsible for their views.

Independent expenditures are thus a less effective vehicle for party communications than coordinated expenditures, and are an inferior policy alternative. While the independent expenditure alternative allows parties to circumvent the limitations of §441a(d) and freely communicate with voters, it weakens the ties between a party and its candidates, and increase the fundraising demands party organizations must face. Further, independent expenditures raise the possibility of presenting the electorate with confusing messages about the relations between a party and its candidates, and threaten to reduce the level of accountability and responsibility achievable through the ballot box. Instead of promoting independent expenditures, the campaign finance system should encourage interaction between a party and its candidates by allowing parties to freely spend money on behalf of its party members who are seeking elective office.

IV. Party Coordinated Expenditures and the First Amendment

So political parties spend money on behalf of their candidates in an effort to help these candidates win elections, which is the principal goal of party organiza-

tions in undertaking election-related activity. Because they are most interested in winning elections, parties spend these funds to help candidates gain voter support. They are especially interested in making incumbents in close races and non-incumbents more competitive, so that these party members will have a better chance of winning those contests that usually determine which party will constitute the majority in Congress. They pursue this end by helping communicate candidates' views to the electorate, in the belief that more effective and extensive communication will make voters more aware of a candidates' attributes and policy positions, and thus increase the share of the electorate willing to support those party members who are seeking elective office. Party expenditures on behalf of candidates are therefore an essential form of political speech. They are the preeminent means by which parties inform the electorate about their candidates seeking office, and they are a vital resource for challengers, who often lack the funds needed to communicate effectively in their campaigns against well-known and well-financed incumbents.

By prohibiting party organizations from spending more than a few cents per voter on behalf of their candidates, the FECA's §441a(d) raises basic First Amendment concerns. This ceiling limits political speech because it severely restricts the amount of money parties may spend on behalf of their candidates. As the Supreme Court concluded in its *Buckley* decision, a limit on the amount an individual or group can spend on political speech is no different from limiting political speech itself: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the

quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached" (*Buckley v. Valeo*, 424 U.S. 19).

The limit on party coordinated spending particularly undermines First Amendment protections because these funds are the principal means by which parties expressly advocate the election or defeat of particular candidates. The general party funding provided under §431 in most cases cannot be used for this purpose. Moreover, the restrictions on spending under §441a(d) are so low that they do not allow many issues to be discussed or much depth of exploration. Indeed, the limits do not even allow the parties to conduct a mailing to all party members or conduct ad campaigns on a number of different issues. The ceilings thus impair the associational rights of party members because party organizations are not allowed to communicate freely with their members, a right that is granted to PAC members, labor union members, corporations, and other political groups under §431 of the FECA. The ceilings also impair the associational rights of party members by restricting the amount of speech they can jointly express to the public at large on behalf of their candidates. Since such speech is an essential means by which parties recruit new members and support, the limit also infringes on a party's ability to attract new supporters.

The Supreme Court has been very clear in setting a standard for judging such restrictions on political speech. Since its ruling in *Buckley*, the Court has held that preventing corruption or the appearance of corruption are the only legitimate and compelling state

interests that justify restrictions on campaign finance. This standard has been upheld in all of the subsequent cases involving campaign spending restrictions that have come before the Court in the two decades since the *Buckley* opinion was issued. On this basis, the Court has struck down limits on the expenditure of personal funds by candidates seeking federal office, except in the case of presidential candidates receiving public funding; on the amount of campaign funds spent by congressional candidates; and on the amount of money spent independently by individuals, PACs, and other political groups.

My understanding of the purposes of the FECA, based on my reading of the legislative history of the statute, is that the limitations on party spending under §441a(d) were not established to prevent corruption or the appearance of corruption in the electoral process. That purpose was served by the contribution limits placed on the funds parties could spend in connection with a federal election, as well as by the strict disclosure requirements imposed on party funding generally, and on party coordinated finances in particular. Instead, party spending was limited because Congress in the 1974 FECA was trying to control rising campaign costs and equalize the amounts candidates could spent on their campaigns for federal office. Congress recognized the close relationship between a party and its candidates, and understood that parties might spend money on behalf of their candidates to supplement the limited amounts the candidates themselves could spend. Congress therefore limited the amounts parties could spend on behalf of their candidates so that party spending would not become a means of circumventing the restraints imposed on candidate spending. Accord-

ing to the Court's ruling in *Buckley* and subsequent cases, the purpose these limits are designed to serve—to equalize the resources available to candidates and control campaign spending—do not constitute a compelling interest that justifies restrictions on political speech.

Moreover, a limit on the amounts parties spend on behalf of their candidates is not needed to prevent corruption or the appearance of corruption, because party coordinated expenditures are not corruptive nor do they create the appearance of corruption in the electoral process. Unlike PACs and other political groups, parties represent broad interests and diverse coalitions. Parties accumulate large numbers of contributions from a wide array of donors and interests, and pool these donations into a common fund that is used to finance all activities in connection with federal elections. Parties thus diffuse any real or perceived undue influence that might arise from any particular contribution.

Indeed, a party's membership and contributor base is so extensive that it cannot be controlled by any particular interest. Nor would a party even seek to be controlled by a few particular interests. The strength of a party organization depends on its ability to attract broad support among the electorate, an ability which would be hindered by adopting the perspectives of a single or even handful of special interests. Parties seek to appeal to majorities and to combine different interests into powerful electoral coalitions; they do not exist to advance narrow interests and try to curry legislative favors from members of Congress. For this reason, most campaign finance experts view party

money as the cleanest source of money in American politics.

Furthermore, a party or its leadership and staff have no reason to corrupt public officials for economic benefit. As noted in the discussion of political parties in section I above, parties do not generate wealth from commercial activities or own independent financial enterprises that might benefit from particular legislative actions. Nor can they gain undue influence over government jobs or contracts, such "spoils" of the campaign finance system have long since been abolished and replaced with a civil service system, government procurement procedures, and a limited number of executive appointments that are determined by the President (in some instances with the advice and consent of the Senate), *not* by the party leadership.

For party funding to be corruptive, a two-step corruption process would have to occur. Initially, donors would have to corrupt or exert undue influence on the party organization or at least the party leadership. The parties, in turn, would have to corrupt the elected officials who represent the party in Congress and encourage them to perform quid pro quos for party donors. There is no evidence that such patterns of influence and decisionmaking take place as a result of party spending under §441a(d).

There is no academic analysis or scholarly study conducted to date that demonstrates that parties are corrupted by the federally regulated contributions, the so-called "hard money funds," they receive from donors. None of the studies of party finance or party coordinated spending contend that these funds are corruptive or generate the appearance of corruption in the political

process. Nor do these funds provide great opportunity for potential quid pro quos, since parties do not allocate these funds on the basis of a candidate's position on any particular issue.

What parties expect from their candidates is that they will run effective campaigns and support party positions once elected, so long as the party's view does not conflict with the individual's personal views or constituency interests. Party committees therefore do not allocate party funds based on some issue litmus test or by comparing a candidate's views to the views held by particular party donors. When parties are deciding whether to spend funds on behalf of a candidate, they chiefly examine the competitiveness of the district or race, the political situation of the incumbent, and the strength of the party contender's candidacy. A candidate's ideology or positions on specific issues are not criteria for selecting which candidates to support, except in the rare instance where a candidate's ideology might dramatically affect his or her competitiveness (e.g., a very liberal Democrat running in a conservative rural district with a large Republican registration advantage). And even in this rare instance, the party may decide to assist the candidate in an effort to promote the party's message in the district and thus build potential future support. But generally, the parties do not reward or punish candidates with party money in an effort to shape their beliefs. This basically "hands-off" approach with respect to a candidate's thinking is best summarized by the following comment by an NRCC official:

> At the NRCC, our only ideology is that you have a "big R" by your name. There is no litmus test on

> any issue. We ask candidates how they feel on "issue X" and "issue Y." Then, we help them articulate what they feel. We are here to help Republicans win. (Cited in Herrnson, 1995:82)

Staff members at the Democratic party committees express similar sentiments.

If party committees were trying to use their expenditures to influence legislative behavior, one would expect that a significant share of the funding would be given to incumbent Representatives and Senators. But this is not the case. As the evidence from recent election cycles indicates, by all standard measures parties provide more funding to non-incumbents than incumbents. Whether considered in terms of the number of candidates to receive party funding, the total amount spent, or the average amount spent, most party money spent in coordination with candidates goes to non-incumbents. And almost none of the money spent by party committees goes to safe incumbents; when parties do assist an incumbent, it is usually because that member is in jeopardy of losing a bid for reelection. In these cases, the parties usually give to an incumbent because that seat is needed to help build a legislative majority, not because a particular donor or member of Congress has exerted undue pressure on party decisionmakers.

Even if party leaders do try to use party funding as a means of encouraging party candidates or elected officials to support party positions, such legislative bargaining is a normal part of the coalition-building process in government. It is not a "corruptive" activity; it is not designed to give a private citizen or other entity some private advantage in exchange for a cam-

paign contribution. To argue that party leaders, by using the limited means available to them to try to encourage party members to support party positions, are engaging in corruptive quid pro quos that undermine the integrity of the political process shows little understanding of the relationships between a party and its members who hold office, and of the process of coalition-building in modern legislatures.

Parties and their candidates have a symbiotic, not corrupting, relationship. Party leaders have an interest in seeing their candidates succeed and in seeing the elected officials who sit in government under their banner serve their constituents well. Parties leaders also have an interest in trying to convince party members to support the broad positions parties advocate, since this is the way in which the parties help develop party cohesion in Congress and thereby encourage the formation of legislative majorities that are essential to the proper functioning of government. It is also a means by which a party helps fulfill the promises and preferences expressed in election campaigns, and thus upholds its responsibility to the voters who voted for its candidates.

Studies of congressional voting behavior offer no evidence that votes of members of Congress or Senators are influenced by party coordinated expenditures or other party contributions. Scholarly research indicates that the factors that generally determine voting behavior are a member's ideological predispositions and the interests of a candidate's political constituency, the voters he or she represents, not the influences of any particular campaign contribution (see, among others, Wright, 1997 and 1996; Herrnson, 1995; Grenzke, 1989;

Welch, 1982; Weisberg, 1978; Kingdon, 1973). The entreaties of party leaders or the provision or promise of party funding are certainly not important factors. Indeed, party leaders generally urge their members to support their constituent's views, even if at the expense of the party position. Paul Herrnson describes this attitude as follows: "Recognizing the primacy of the electoral connection, party leaders generally tell legislators to respond to constituents rather than 'toe the party line' when the latter could endanger their chances of reelection" (Herrnson, 1995:234). Accordingly, party leaders have not made funding contingent on a candidate's support for party positions.

While most incumbents do not receive party funding, some incumbents do help raise money for the party. As with most party fundraising, elected officials are asked from time to time to assist their party with this necessary and difficult task. Party fundraising efforts to generate the monies needed to finance coordinated expenditures thus do offer another means by which a relationship between candidates and donors might be established. But again, there is little evidence to suggest that this help in raising party funds is corruptive or influences the voting behavior of members of Congress. Most of the money raised by party committees is generated by means such as direct mail and fundraising events that do not involve direct solicitation by candidates or elected officials. The monies raised go to party financial accounts, not to the accounts of a particular candidate. Moreover, the law specifically prohibits elected officials or candidates from raising funds for the party and then earmarking them for use in connection with their own campaigns. And the data on party spending clearly show that monies received by

party committees are largely spent on non-incumbents, not on the incumbents who may be in a position to help raise monies for party activities.

Moreover, if the fundraising pressures on candidates were to be a concern, this would be another reason to question the current system of party spending limits. Because the parties are strictly limited with respect to the amounts they can spend on behalf of candidates, candidates cannot rely on party assistance to gain the resources they need to finance their campaigns. Consequently, candidates are forced to rely on their own fundraising efforts, which means that they have to spend more time raising money than they would under a system of unfettered party participation.

Finally, the law already contains sufficient safeguards to guard against any undue influence. All of the funds raised by the parties for use in connection with federal elections and all of the funds used to pay for coordinated expenditures are subject to federal contribution limits. Any individual contributions are subject to the $25,000 annual aggregate ceiling. The law prohibits the use of any labor treasury funds or corporate funds. It also prohibits candidates and elected officials from raising contributions for the party and earmarking them for use in their campaigns. All of these monies are subject to strict public disclosure requirements.

In addition, the parties must disclose all coordinated expenditures made on behalf of federal candidates. The parties must use a specific report form included in their federal disclosure reports to itemize all coordinated expenditures. For each expenditure, a party committee is required to report the name and address of the

payee; the purpose of the expenditure; the name of the candidate benefitting from the expenditure, including campaign committee address and office sought; the date of the expenditure; the amount of the expenditure; and the aggregate amount the party has spent on behalf of that candidate. The data filed on these reports is summarized by the Federal Election Commission and reported in its press releases and reports. The Commission provides both summary data on the amounts spent on behalf of House and Senate candidates by each party, as well as summaries for each candidate arranged by state and district.

V. Conclusion

Political parties differ from PACs or other political groups because they represent broad interests and coalitions of diverse viewpoints, rather than narrow interests with particular legislative concerns. Parties are therefore a unifying force in our pluralistic political society. They are an essential means of resolving differences between organized interests and large blocs of voters, and they work to develop ideologies and policy positions that will appeal to broad segments of the populace.

Parties seek to attract supporters and expand their public appeal by promoting political discussion, developing issue platforms, and, most importantly, participating in election campaigns. Election campaigns are the primary activity of party committees. Parties recruit candidates, assist candidates in organizing their campaigns, help them develop issue positions and communicate their views to voters, and work to mobilize voter support. Parties take a great interest in helping their candidates contest elections, because candidate

speech is the principal means by which party views are disseminated to the electorate. Also, parties must win elections in order to build legislative majorities and see the policy preferences of their broad memberships translated into government action.

Parties thus play an essential role in the electoral process. They are particularly important to the vitality of our democracy because they are the only source of funding available to federal candidates that favors challengers over incumbents. Unlike PACs and other organized interest groups, which are most concerned with achieving their particular legislative goals and thus support those candidates who reflect their particular views, regardless of their party affiliation, parties are most concerned with helping their candidates run effective campaigns, irrespective of a candidate's particular issue positions or policy preferences. Consequently, PACs and other groups spend the vast majority of their political money on incumbents, while parties devote most of their resources to non-incumbents, usually spending significant amounts on incumbents only when they are in jeopardy of losing their seats. Party funding thus helps to overcome the enormous financial advantage incumbents enjoy as a result of PAC donations and the benefits that accompany their positions in government.

Political party spending therefore has a number of salutary effects on the political system. It reduces the influence of PAC or other interested money in the political system. It improves the candidate choices available to voters, enhances the level of competition in election contests, and encourages citizen participation in election campaigns. It also reduces the potential for

corruption in the system, since political parties are the cleanest source of money in the process and allocate resources without requiring candidates to take particular positions on issues. Indeed, no study of party coordinated spending has found that these monies have a corruptive effect on candidates or afford party donors undue influence in the legislative process. But these salutary effects, which primarily result from the coordinated expenditures that parties make on behalf of their candidates, are limited under current law, because the FECA strictly limits the amounts parties may spend in coordination with their candidates.

The current ceiling on party coordinated spending under §441a(d) significantly weakens the role of parties in the political systems because it severely restricts their ability to communicate freely with their membership or the public at large. The ceiling prevents party committees from working with their candidates to communicate their views to the electorate in a meaningful way. For example, the ceiling is so low that it does not allow a party committee to produce and mail just one letter to the eligible party voters in a district, nor does it allow parties to broadcast more than one or two thirty-second ads to a statewide audience. Such stringent restraints significantly impede the ability of parties to expressly advocate the election of their candidates.

The limit on party coordinated spending is particularly egregious because it serves no constitutional purpose. This statutory provision was not adopted to prevent corruption or the appearance of corruption in the political system; it was established to help cap campaign spending and equalize the resources available

to candidates—two objectives that have been overruled by the Supreme Court as justifying infringement on the right of free speech. Moreover, in the two decades since the Court established the prevention of corruption or the appearance of corruption as the only constitutional purpose for limiting political speech, no significant evidence has emerged that demonstrates that the federally-regulated monies spent by parties in connection with federal elections has a corruptive effect on the system, or even leads to an appearance of corruption that justifies impairment of a party's First Amendment rights.

For these reasons, the limit on party coordinated expenditures under §441a(d) constitutes an unjustified limit on a party's political speech and associational activities. It is also bad public policy, since it weakens the role of parties in the electoral process and increases the influence of alternative means of campaign finance that are not as beneficial as party finance.

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Table 1: Political Party Federal Financial Activity: 1977-1996

		1977-78	1979-80	1981-82	1983-84	1985-86	1987-88	1989-90	1991-92	1993-94	1995-96
Democrats	Raised	26.4	37.2	39.3	98.5	64.8	127.9	85.7	177.7	139.1	221.6
	Spent	26.9	35.0	40.1	97.4	65.9	121.9	90.9	171.9	137.8	214.3
	Contributed	1.8	1.7	1.7	2.6	1.7	1.7	1.5	1.9	2.2	2.2
	Coord Exp	0.4	4.9	3.3	9.0	9.0	17.9	8.7	28.0	21.1	22.6
	Indep Exp										1.5
Republicans	Raised	84.5	169.5	215.0	297.9	255.2	263.3	206.3	267.3	245.6	416.5
	Spent	85.9	161.8	214.0	300.8	258.9	257.0	213.5	256.1	234.7	408.5
	Contributed	4.5	4.5	5.6	4.9	3.4	3.4	2.9	3.0	2.8	3.7
	Coord Exp	4.3	12.4	14.3	20.1	14.3	22.7	10.7	33.8	20.4	31.0
	Indep Exp										10.0

Source: Based on Federal Election Commission data. All figures represent dollars in millions.

Table 2: Political Party Nonfederal Financial Activities, 1991-96

Committee	1991-92		1993-94		1995-96	
	Receipts	Expenditures	Receipts	Expenditures	Receipts	Expenditures
Democrats						
DNC	31,356,079	28,388,869	43,923,516	45,097,098	101,905,186	100,483,977
DSCC	566,111	506,362	372,448	416,743	14,176,392	14,061,273
DCCC	4,368,980	4,017,579	5,113,343	5,135,552	12,340,824	11,822,790
State Parties	34,273,618	38,113,972	41,653,597	47,212,746	92,780,525	96,328,374
Republicans						
RNC	35,936,945	33,601,431	44,870,758	42,413,166	113,127,010	114,401,973
NRSC	9,064,167	7,655,641	5,582,013	6,527,505	29,395,329	29,362,653
NRCC	6,076,321	6,209,404	7,371,097	4,747,525	18,550,773	28,746,879
State Parties	27,976,081	31,109,295	38,896,846	46,430,493	64,260,796	70,920,959

Source: Based on data reported by the Federal Election Commission. All figures represent dollars.

Note: National and state party committees were not required to report nonfederal financial activity to the Federal Election Commission before 1991. State committee data include only the nonfederal share of funds raised and spent on activities related to federal elections. Figures do not include funds raised and spent solely in connection with state and local elections, which are not reported to the Federal Election Commission.

Table 3: Party Coordinated Expenditures By Committee, 1985-1996

Committee	1985-86	1987-88	1989-90	1991-92	1993-94	1995-96
Democrats	8,977,048	17,926,840	8,724,233	28,050,903	21,213,171	22,576,000
DNC	343,348	8,107,044	117,427	11,269,458	(348,251)	6,695,323
DSCC	6,066,372	6,207,437	4,524,922	11,235,712	12,295,902	8,397,129
DCCC	1,545,376	2,425,603	2,877,283	4,135,861	7,730,815	5,689,644
State/Local Committees	1,021,952	1,186,756	1,204,601	1,409,872	1,534,705	1,793,904
Republicans	14,340,382	22,713,916	10,738,166	33,853,435	20,616,729	30,959,151
RNC	2,100	8,289,173	46,344	11,250,113	4,709,429	22,766,118
NRSC	9,959,330	10,250,538	7,684,154	16,477,387	10,905,500	308,319
NRCC	4,098,389	4,109,352	2,830,485	5,189,740	3,930,314	7,329,880
State/Local Committees	280,563	64,853	177,183	936,195	1,071,486	554,834

Source: Based on data reported by the Federal Election Commission. All figures represent dollars.

Table 4: Allocation of Party Coordinated Expenditures: 1995-1996

	Democrats				Republicans			
	No. of candidates	Dollar Amount	% of Total	Average Amount	No. of candidates	Dollar Amount	% of Total	Average Amount
President	1	6,732,246	100	6,732,246	1	11,704,932	100	11,704,932
Senate	28	8,611,897	100	307,567	32	11,052,146	100	345,380
Incumbent	5	1,330,580	15	266,116	12	4,023,474	36	335,289
Challengers	10	2,638,799	31	263,880	7	2,350,308	21	335,758
Open Seats	13	4,642,518	54	357,117	13	4,678,364	42	359,874
House	316	7,035,843	100	22,265	156	7,998,844	100	51,275
Incumbent	132	1,426,212	20	11,595	63	2,962,096	37	47,017
Challengers	151	3,935,829	56	26,065	52	2,739,500	34	52,683
Open Seats	42	1,673,802	24	39,852	41	2,297,248	29	56,030

Source: Based on data reported by the Federal Election Commission.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 89 N 1159

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN
COMMITTEE, ET AL., DEFENDANTS/COUNTER-PLAINTIFF

DECLARATION OF ROBERT HICKMOTT

---

1. My name is Robert Hickmott.

2. In 1980, I worked at the Democratic National Committee (DNC) as an Associate Finance Director during the Carter campaign. I did fundraising and advance work for the DNC, helping them raise money to make their 2 U.S.C. § 441a(d) coordinated party expenditures.

3. In 1981, I became the Executive Director of a new DNC entity, the Democratic Business Council (DBC). The Democrats had just lost the White House, and the DBC was an attempt to be more aggressive in our outreach to solicit contributions from the business community.

4. Towards this end, the DNC set a new $10,000 contribution level to join the DBC. Up to that time, it was $5,000. The $10,000 could include both corporate and non-corporate money. What contributors got in return was three or four weekend events throughout the country, in which they got together with party officials and Members of Congress to talk about issues, and to socialize. These were not fundraising events, but rather sustaining donor events where no additional money was raised. However, donors were asked to invite prospective donors, who might later decide to join the DBC.

5. Potential donors were told of these events in advance, as an incentive to join the DBC. There was a brochure that spoke about meeting other like-minded business leaders, as well as Members of Congress. For example, the Philadelphia Stock Exchange hosted DBC members at the Democratic Party's 1982 mid-term convention, and different Members came by and discussed business and economic issues with donors. We also had dinners and receptions attended by Members of Congress. Every now and then we would go to a nice resort like Palm Springs or Nantucket, and Members of Congress would come and talk with donors. Most events attracted in the range of 35-50 donors, out of an eventual total of about 150 donors.

6. We tried to match up donors' interests with the Members who would be present. These were usually corporate donors who contributed for business purposes, so we tried to arrange, for example, that they could discuss tax issues with Sen. Bradley; or telecommunications issues with Rep. Wirth, when he was Chairman of the Telecommunications and Finance

Subcommittee. They also had opportunities to play golf with the Members, to have cocktails with them, or just to hang out together.

7. I served as National Finance Director for Tim Wirth's Senate campaign from May 1985, through his election in Nov. 1986. We eventually raised over $4 million. I served on Sen. Wirth's Senate staff from Jan. 1987 until Feb. 1989; and then, after a couple of years as a lawyer in private practice, I joined the Democratic Senatorial Campaign Committee (DSCC) in Jan. 1991 as the Deputy Executive Director. However, the Executive Director and I also became de facto Finance Directors for the entire cycle and even, for a time, Political Directors, as well, after those holding the positions resigned. This was for the 1991-92 election cycle.

8. As such, we were responsible for running the DSCC's tally system during this cycle. The tally system goes back to at least when George Mitchell was Chairman [1985-86], and maybe further. It is an informal agreement between the DSCC and the candidates' campaigns that if you help the DSCC raise contributions, we will turn around and help your campaign.

9. In the 1986 Wirth Senate race, the DSCC could make over $100,000 in coordinated expenditures for our campaign, so there was pressure on the campaign, and on me, to raise this money for the DSCC. Sen. Mitchell, who was at that time the Chair of the DSCC, came out to Colorado. Norm Brownstein, a major Denver fundraiser, hosted a dinner and reception at which Sen. Mitchell was the featured guest. That and other

fundraising connected to the visit raised enough money for the DSCC to take care of our tally obligation, so that the DSCC would make the full amount of its permitted expenditures in support of our campaign. We also told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum § 441a(d) allocation from the DSCC.

10. Mr. Brownstein was one of our campaign's top fundraisers. He sponsored this event for the DSCC because it benefited the Wirth campaign.

11. There are prescribed limits for coordinated party expenditures set out at 2 U.S.C. § 441a(d), which the Federal Election Commission computes and publishes early in each election cycle. At that time we know the legal limit the DSCC can expend in each Senate race. Because the DSCC does not have enough money to fully fund every candidate, they look at a number of factors when making allocations. These include the financial strength of the individual campaign, how much money they have been able to raise for themselves, what are the poll numbers, does the campaign have a chance to win, and how much money has the campaign raised for the DSCC.

12. This situation was particularly acute in the 1991-92 cycle. Virtually every major State except Texas had a Senate election, plus we had two Senate races in California and a special election in Pennsylvania in 1991, following the death of Sen. Heinz.

13. There is no set formula of "magic threshold" for how much money candidates are expected to raise before the DSCC will turn around and help them. However, we kept very detailed ledger sheets showing how much money was tallied for each candidate. It got to the point where we talked to some campaigns on a daily basis, because they were so anxious to make sure that everything they were entitled to had been entered on their ledger sheet. When we got down to the allocation process, which traditionally begins after Labor Day, that was a key factor in deciding how much each Senate race was going to get in coordinated expenditures from the DSCC.

14. Because this was so important, people would ask others to help out. We frequently faced the situation where several people wanted credit for the same contribution to the DSCC, such as, for example, the National Association of Homebuilders' annual $15,000 donation. So we developed the policy that the contributor would have to say in writing how the check should be credited.

15. This system insured that the campaigns were very much on top of who contributed to the party committees. Early in each cycle, we held an incumbents' retreat, where all of the incumbent Senators were told by the Chairman of their obligation to raise money for the DSCC. The Chairman and I also went around and visited each Senator, telling them what services the DSCC could provide, but also asking how they planned to raise money to meet their DSCC fundraising goal.

16. Incumbents are usually in a much better position to raise money that are challengers and those running for open seats. We did have a challengers' retreat, which has a fundraising component but focused more on how to run a campaign and on the campaign services we could provide.

17. We kept both Sen. Robb, who was DSCC Chair, and Sen. Mitchell, the Majority Leader, apprised as to how much tally money had been raised by the individual Senators. Because Sen. Robb could not focus too closely on the DSCC at the time, Sen. Mitchell was in many ways the de facto DSCC Chair and therefore had substantial influence on its operation. They kept on top of the Senators and admonished Senators who had not produced their fair share of contributions to the DSCC.

18. Incumbents who were not raising money for themselves because they were not up for reelection would sometimes raise money for other Senators, or for challengers. They would send $20,000 to the DSCC and ask that this be entered on another candidate's tally. They might do this, for example, if they were planning to run for a leadership position and wanted to obtain the support of the Senators they assisted. This would personally benefit them, in addition to their doing their part to retain Democratic control of the Senate, which would preserve the legislative power of all Democratic Senators. While there was some talk of crediting part of this to their tally in a future cycle, we never did this, because we did not think the DSCC should be bound in subsequent cycles by money that had been raised and spent in a previous cycle.

19. The biggest problem with the tally system was that Senators and candidates wanted an ironclad contract that whatever money they raised for the DSCC would automatically be spent in support of their campaigns. That would be earmarking, which is illegal, and so we could not do it.

20. It is obvious that a fledgling campaign that is struggling to meet its payroll, buy media, and so forth, and knows that the DSCC can allocate to them several hundred thousand dollars, wants to make certain that it will get back all of the money it raises for the DSCC. A lot of their local fundraisers and contributors hate the DSCC, they view it as a Washington fundraising entity, and want a guarantee that, if they make a $20,000 contribution to the DSCC their candidate will see that money returned.

21. We would insist that we review the fundraising letters that campaigns would send out, and would frequently have to rewrite them with respect to the tally process. While the campaigns did not like this, the only way the DSCC can hope to raise the amount of money it needs to spend is if the individual campaigns assist in raising a significant portion of the DSCC's overall budget.

22. The way the system operates, the bottom line has to be that some candidates get back more money than they raise, and others get back less. How much money a particular candidate received depended on the financial strength of the campaign itself, including both what they had raised on their own behalf and how much there was on the tally for the DSCC, and what their poll numbers looked like.

23. One thing we did across the board, for every campaign, was to give them a check for $ 17,500, the maximum direct contribution we were allowed to make under 2 U.S.C. § 441a(h). This had not been done in the past because of the feeling that some campaigns did not need it. However, we gave it to everyone. As I recall, we asked for this money back when Richard Shelby and Ben Nighthorse Campbell switched parties.

24. Then the campaigns would start pleading with us for additional money. Early on, we would look at what their needs were, maybe an early poll or an early media buy, and we would fund those projects. When we got into the real allocation process, the DSCC's Political Director, the Executive Director, and I would sit down and review exactly those factors I have noted above. We would then make recommendations to Sen. Robb and Sen. Mitchell for the allocation process. There was a group of other Senators, the Allocation Committee, involved as well. Sometimes they would approve our recommendations, but they might also increase them. Candidates know when there is going to be an allocation meting, and start lobbying members of the Allocation Committee, barraging them with news clips and poll numbers, arguing that an extra $200,000 would put them over the top. The Senators on the Allocation Committee would argue over who had the best chance of winning or who needed the money most. For example, we might have recommended spending a total of $750,000 at a particular time and the Allocation Committee would commit $900,000.

25. Also, as it got closer to Election Day, when it seemed we could win every race, Senators would urge us to borrow an additional $2 million, promise faithfully

to help us repay it, and then be nowhere to be seen after the election. That is why the DSCC winds up spending the first 6-8 months of each new cycle paying off debts of the previous cycle.

26. The allocation process may have changed since I left. It is my understanding that Sen. Kerry, the current Chairman, makes most of these decisions unilaterally.

27. Traditionally the DSCC was about one thing, raising money. In the mid-1980's, they started getting into more areas, such as campaign services, strategy, and opposition research. They now have a staff between 25 and 35 people, most of whom are involved in fundraising. But there is a press operation, an opposition research operation, and a political operation as well.

28. During the election cycle I served on the DSCC, the political component of the DSCC would be in daily contact with the campaigns. They tried to know each campaign as well as an outsider can possibly know it. There were also constant visits by the Political Director and his or her staff, so they knew if the campaigns were (or were not) doing well. In my election cycle three people worked for the Political Director. They divided up the different campaigns by region and served as their campaigns' contact at the DSCC.

29. The DSCC contact advised the campaign whether it should be doing opposition research. In the case of a challenger, the DSCC might help the campaign understand what was happening in Washington on a legislative issue and how that could work to their

advantage as a challenger. The DSCC contact would also ask incumbent Senators to campaign for a certain challenger.

30. We kept lists of fundraisers, pollsters, and media consultants that we made available to those who requested them. In one of the prior cycles we had a team of Democratic consultants who would fly into a campaign and try to help the campaign get up and running, the expenses of which would be allocated to that campaign. We pretty much let the campaign take the lead in how the money was spent. If we thought the money would be better used in other ways, we would tell them, but the final decision was theirs. They would send us their bills for the agreed upon amount, and we would pay them.

31. I am not aware of any instance in which a Senator who had to cast a particularly difficult vote was promised DSCC money in return for that vote. On the other hand, I know the DSCC did not receive money from certain people or groups because Sen. Robb voted in favor of Clarence Thomas; and at times the labor community withheld money because they did not like some of his votes. While it is likely they did try to influence his vote on certain issues in exchange for their support of the DSCC, they would have done that through the normal legislative process, through lobbyists visiting his Senate office, and not through the DSCC.

32. The Majority Leader decides who will Chair the DSCC. Consideration is given to who can raise money, as well as who is well thought of by contributors and has broad appeal to the business community.

33. The DSCC Chair is considered part of the Senate Leadership, and as such may have access to the Party's political agenda and be able to see how certain actions impact on the overall politics of the Democratic Party in the Senate.

34. Approximately 50% to 60% of the DSCC's money was raised by incumbent Senators and Senate candidates. We also had direct mail money and several sustaining donor programs. The Majority Trust was for $20,000 contributors (hard money). The Leadership Circle was for contributors of $15,000 in hard money, and was made up largely of PACs. There was also a Business Roundtable that was for $5,000 contributors.

35. What contributors got for their contributions to the DSCC was similar to what we did years before at the DNC and the DBC. They would be invited to weekend events in which they would go to the Superbowl or to Nantucket with Senators. They would socialize and discuss their interests and concerns. Donors paid their own travel costs to these events. The DSCC paid for the Senators' travel, since we viewed this as an opportunity to spotlight candidates for potential contributors. We would also pick up the tab for the meal functions, or sometimes these were furnished as corporate in-kind contributions.

36. Some contributors made part of their required $15,000 or $20,000 contribution by raising money for the party from others or by attributing the cost of hosting a Sustaining Donor event in their homes against their annual contribution to the DSCC. We could encourage contributors to recruit other potential contributors by inviting them to attend. Then we would contact these

people and solicit them for a contribution, hoping they would be interested in the opportunity to rub elbows with the Senators and party officials.

37. We were at times able to combine fundraising projects. For example, if we were holding a Majority Trust weekend in Nantucket, some Senators might stop in Boston on the way and do a tally event for Sen. Kerry's campaign.

38. We also had monthly breakfasts featuring a guest speaker, such as a Senator who was of interest to the contributors. Sen. Robb would usually give an update on the different races at these breakfasts.

39. The larger the contribution, the smaller and more exclusive the group of people who attended the get togethers with the Senators. For example, at the Democratic Convention in New York in 1992, the Majority Trust got better seats in Madison Square Garden, and I think they also got a luncheon with Sen. Mitchell and the Democratic Leadership. This was smaller and more intimate than the Leadership Circle functions, which were smaller than the $5,000 donor functions.

40. The annual DSCC dinner is at the other end of the spectrum. It is a huge event, and each Senator is told he or she has to sell tickets for a certain number of tables at $20,000 a table. A Senator might go to a prominent lobbyist and ask for help in raising this money from the lobbyist's clients. Later, the Senator might remember that the lobbyist had helped him or her raise this money, at the time that the lobbyist's

clients needed the Senator's help with a legislative matter.

41. Early in each election cycle the DSCC would routinely contact the State Democratic Party committees in all states in which we had Senate candidates, and ask that they transfer their coordinated expenditure limit ("§ 441a(d) authority") to us. They never to my knowledge asked for anything in return. No state ever refused to hand over its § 441a(d) authority or even tried to give us only partial authorization. On the contrary, they appeared to be relieved to be rid of their obligation to raise hard dollars to spend on their Senate candidates. Occasionally, if we could not fully fund a race, we would return that authority to the state party at the state party's request, so they could try to raise and spend the full amount authorized by law.

42. In the final stages of the 1992 election, we had a lot of coordination with the DNC and the Clinton/Gore campaign, to the point that we were making recommendations to them as to where an infusion of their money would help our Senate candidates. This was get out the vote ("GOTV") money. Typically, though, we did not have a close working relationship with them, or with the DCCC. This may have changed now that the DNC has a lot more money than it used to.

43. Nor did we have much to do with the coordinated campaigns for state candidates run by the individual state party committees, became back then we raised very little soft money. We might instruct challengers how to conduct a GOTV campaign, but that was tutorial, rather than part of our budgeting and

fundraising operation. Again, this may have changed since soft money is a much larger component of the DSCC's expenditures than when I was there.

44. We had very little contact with the state party committees at all. Most of our dealings were directly with the Senate campaigns, and those campaigns then dealt with their state parties. Most state parties were so anemic and ineffective that, from our point of view, there was little to be gained from direct interaction. There were a few that had enough resources to have some impact, such as the California and New York state party committees, but not very many.

45. This was also true of Sen. Wirth's 1986 race. We were such a cash-starved campaign that we were fully preoccupied with raising money for the campaign, rather than for the State Party. There was some orchestration between the State Party and the Wirth campaign as far as the things they could do for us under the law, such as generic party building and GOTV, but that was handled by the State Party Chairman and the Wirth Campaign Manager in Colorado, while I remained in Washington.

46. There is a very rare strata of contributors who contribute large amounts to the DSCC because they actually believe in Democratic politics and the fact that the Democratic Party represents something that the Republican Party does not. The majority of those who contribute to political parties do so for business reasons, to gain access to influential Members of Congress and to get to know new Members.

47. If you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at our various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates.

48. This can ultimately prove useful when the contributor calls up and reminds a Senator that he met him in Minneapolis at the Superbowl, and says he would like to come in and discuss pending legislation. The door is more likely to be open to him than if the call was from a non-contributor.

49. On occasion a contributor would call the DSCC and ask us to arrange a meeting with a Democratic Senator, and we would try to comply. We maintained good relationships with the Administrative Assistants [AA] in the Senators' offices; and, while we would not say you must do this, we would spell out the circumstances in seeking agreement to meet with the contributor. Since we did not deal in legislation at the DSCC but were purely a fundraising committee, we might not know if there was something going on that would make a particular meeting inappropriate. If so, the AA might tell us it wasn't the right thing to do at the time.

50. There were some contributors who expected something further for their money and did not like being told they could not have this meeting arranged. No one ever asked for their money back in that situation, although some threatened not to contribute in future years. Since we were an incumbents' committee,

we felt an obligation to protect the Senators from being placed in a potentially awkward situation.

51. A lot of our big contributors were contributing to the Republicans as well. If you look at our Leadership Circle, which is predominantly $15,000 PAC contributors, there is a high correlation between those who give money to the DSCC and those who give money to the Republicans. This was less likely to be true of Majority Trust members, who were mostly business people who were Democrats.

52. Sometimes a contributor would give money to the DSCC in lieu of giving to a candidate. For example, if a candidate did not take PAC money, the PAC might donate to the DSCC instead and have it tallied to that candidate's account.

53. I think there ought to be limits on what parties can spend on elections. It is hard to quantify a direct correlation between large contributions and corruption, or appearance of corruption, in the political process. On the other hand, recent allegations about large amounts of money flowing into the DNC or the Clinton/Gore White House certainly give the perception that there is a correlation between access and large contributions. Both parties sponsor Sustaining Donor programs, such as those we have been discussing, for which the party committees sponsored events where large contributors would meet with Senators. Increasing the amount of money that [redacted] committees can spend on campaigns will necessarily increase the pressure to raise money through such events.

54. Obviously I would have liked to have had more money when I was with the DSCC. We lost several races by just a few percentage points. However, I think the system is prone to corruption. If unlimited amounts of money can be spent, and this is not properly policed, a national party committee could overwhelm a Senate race with money. We keep ratcheting up the limits, and there is no telling where this will end.

55. This all comes back to the allocation system. This is a decision made by Democratic Senators. If people start giving $50,000, $100,000, or $500,000 to a party committee, even if that is soft money, they would probably expect a greater voice in how that money was spent and what they would want in return. It is unrealistic to think that if I give you a check for $500,000, I will not expect you to make the largest possible contribution to my favorite candidate who can do the most for my legislative concerns.

56. Permitting such large contributions would also discourage participation by those who can only make small contributions. People already think the system is so out of whack, they ask, why should I give a check for $25 or $50, because that doesn't really mean anything. The direct mail proceeds for all three Democratic national committees have gone way down, and these donors are the "true believers." Many of them are retired, and are concerned about issues like Social Security and liberal philosophical issues. I think their participation is an important aspect of democracy, and it would be a shame if they stopped contributing because they feel their small checks have no impact.

57. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ ROBERT HICKMOTT
ROBERT HICKMOTT

Executed on this 8th day of April, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 89 N 1159

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANTS

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN
COMMITTEE, ET AL., DEFENDANTS/COUNTER-PLAINTIFF

DECLARATION OF ROBERT ROZEN

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1. My name is Robert Rozen.

2. I began working for Sen. Wendell Ford after I graduated from law school in June 1980. I was responsible for all issues before the Senate Finance Committee, and from the spring of 1984 until early 1985 I handled his work with the Rules Committee, on which he was Ranking Minority Member.

3. From January 1985 until January 1995, I worked for Sen. George Mitchell. I handled a variety of legislative issues from Sen. Mitchell, including tax, trade, banking, and other financial issues, including campaign finance reform.

4. Sen. Ford chaired the Democratic Senatorial Campaign Committee (DSCC) in the 1981-1982 election cycle. Sen. Mitchell held this position in the 1985-1986 cycle. My experience was that both Senators kept their DSCC work separate from the office, in the sense that no legislative staff was involved with DSCC campaign activities. I had no direct involvement in DSCC work, although I did gain general knowledge about DSCC operations from my proximity to the Chairmen. Additionally, my extensive work from 1987 through 1994 on campaign finance reform legislative efforts exposed me to DSCC issues. It is my sense that Administrative Assistants know who has contributed both to their Senator's campaign and to the DSCC, although some of them keep closer track of this than others.

5. At least on the Democratic side, the Majority Leader is heavily involved with the Senate campaign committee. The Majority Leader picks the Chair of the DSCC, and is also involved in candidate recruitment, a primary responsibility of the DSCC. Even if other Senators or DSCC staff members make the initial contacts, the Majority Leader wants to size up potential candidates and be helpful in encouraging potentially strong candidates to run for office. Oftentimes, the candidates want to close the deal with the leader of their party in the Senate.

6. Other than recruiting candidates, the DSCC's main responsibility is raising money for Senate campaigns. Especially during the last 15 months of an election cycle, the Committee is very active. Many

weekends, four or five Senators will be out on the road, raising money at DSCC events. Certain Senators are bigger draws than others, and the Majority Leader usually is the biggest draw of all. So he probably attends as many of these events as anybody else other than the Chairman.

7. Under the DSCC's tally system, all Senators are expected to help raise money for the party. Some do it more enthusiastically than others, but the expectation is there. Senators can solicit contributions directly, or sponsor fundraising events on behalf of the DSCC. The DSCC also sponsors its own events, using Senators to draw contributors.

8. Sen. Mitchell took an especially active role with the DSCC after he was elected Majority Leader in Nov. 1988. For example, it was his decision that the DSCC did not raise soft money during his six years as Majority Leader.

9. It is only natural that most individuals and PACs want to make sure that they get maximum recognition for whatever money they contribute. Of course, some expect nothing in return, while others are more aggressive in trying to get a lot of mileage out of their contributions. I would expect most of the largest PACs give the maximum allowed, or close to it, to party committees, and then send their members to party events or otherwise attempt to meet personally with Senators. They may buy a table at an event for $10,000 and invite staff or a Member to sit at the table. Other events are stand-up receptions where this sort of close interaction is more difficult. But the idea for anyone who goes to any of these events is to be seen by Members of Congress.

10. Contributors believe this interaction has an effect on Members, whether it does or not. Certainly, it does have an effect on some Members. If you are raising money for your campaign, or you have a tally and you're raising money for the party, and you have solicited a $15,000 or $20,000 contribution, oftentimes this is going to have some effect. This is just based on human relationships, you are grateful to people who want to help you and naturally want to be responsive to them.

11. The bottom line is that there is a symbiotic relationship between contributors and candidates. A contributor gives to have the opportunity to influence a Member, and the Member is willing to provide this opportunity in order to raise more money. While this is usually subtle, it can be extremely direct. For example, I know of a company that was recently involved in a legislative battle critical to its bottom line. One Senator in particular was working on this issue. The company, which was known to be a financial supporter of the other party, was asked by the Senator, "Well, where have you been?" and the Senator's representatives later told the company that they had to "be at the table," to contribute, if they wanted their views to be heard. This was a shakedown, pure and simple. And it worked – the company wound up contributing to the national Senatorial Campaign Committee of the Senator's party, as requested.

12. Very little money that does not come through the mail is what I would call "detached" money. Typically, a contributor gives money to establish relationships, to be able to lobby on an issue, to get close to Members, to be able to have influence. While an elected official of course does not have to do something because somebody gave, a contribution helps

establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather, it is one step removed: relationships are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship.

13. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ ROBERT ROZEN
ROBERT ROZEN

Executed this 17th day of April, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 89 N 1159

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANTS

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN
COMMITTEE, ET AL., DEFENDANTS/COUNTER-PLAINTIFF

DECLARATION OF THE HON. PAUL SIMON

---

1. My name is Paul Simon. I represented the 24th Congressional District of Illinois in the U.S. House of Representatives between 1975-1985, and served as a U.S. Senator from Illinois from 1985 to 1997.

2. While serving in the House, I made phone calls to raise money for the Democratic Congressional Campaign Committee (DCCC). I also attended their fundraising events, both in the Washington area and in other cities. After I moved to the Senate, I did much the same thing, on a larger scale, for the Democratic Senatorial Campaign Committee (DSCC).

3. While some of the party committee events I attended were large affairs, most had 20-25 people and were held in somebody's home. They usually were held

for the benefit of a specific Senate campaign as well as for the party committee itself. Each House Member or Senator present would say a few words, as would the Chair of the DCCC or the DSCC, and then we would socialize with the donors. About once a year I attended an all-day conference for major donors where Senators would each speak about legislation we were interested in, and answer questions.

4. The DCCC and the DSCC would ask Members to make phone calls seeking contributions to the party. They would assign me a list of names, people I had not known previously, and I would just go down the list. I am certain they did this because they found it more effective to have Members make calls. However, my phone manner is rather low key, lower key than the committees like.

5. I tried to avoid asking donors who had previously given to my campaigns to contribute to the party committees, because I didn't want to overdo my welcome. However, I did co-host party fundraising events in Illinois, where invitations were likely sent to my contributors.

6. If this were a DSCC event, the money raised would be credited to Senate candidates based on the DSCC's tally system. Donors would be told the money they contributed could be credited to any Senate candidate. The callers would make clear that this was not a direct contribution, but it was fairly close to direct. So contributors would have the sense that this would benefit my campaign, if they contributed to the party.

7. While I don't believe we were given a specific fundraising goal, we knew how much the DSCC could contribute in Illinois, which in my campaigns was a little more than $1,000,000. It was recognized that the closer you came to that with your tally, the more likely you were to get the full $1,000,000.

8. With regard to the Illinois Democratic Party, my own experience was that I more frequently got requests from them for money than the other way around. I sometimes made phone calls for them, or they would request a check for $5,000 to help with get out the vote activities, or a gubernatorial race. I may also have appeared at fundraising events for the State Party.

9. However, I generally did not work closely with the State Party on anything, because I never regarded them as major players. This has been true historically in Illinois, although it may be different in other States. It may also be different in Illinois, with regard to state races. But they were not a significant factor in my Senate races.

10. It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had

contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress.

11. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, "I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread." I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

12. I believe people contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively.

13. Giving to party committees also helps you gain access to Members. While I realize some people argue donors don't buy favors, they buy access, that access is the abuse, and it affects all of us. If I got to a Chicago hotel at midnight, when I was in the Senate, and there were 20 phone calls waiting for me, 19 of them names I didn't recognize and the 20th someone I recognized as a $1,000 donor to my campaign, that is the one person I would call. You feel a sense of gratitude for their support.

14. The fact that big donors have access gives them a huge leg up in the process. In a very real sense, we are going through the old fight between Thomas

Jefferson and Alexander Hamilton: should propertied interests have preference in what goes on in government? And our answer, with our present system of financing campaigns, is yes, people with money are going to be given greater influence, because their names are going to be recognized. They are going to have greater access than those who did not contribute.

15. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ PAUL SIMON
PAUL SIMON

Executed on this 3rd day of May 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 89 N 1159

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN
COMMITTEE, ET AL., DEFENDANTS/COUNTER-PLAINTIFF

DECLARATION OF FORMER SENATOR TIMOTHY E. WIRTH

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1. I am Timothy E. Wirth, Undersecretary of State for Global Affairs. I completed graduate studies in 1973 and also held appointments in the executive branch of the federal government from 1967-70.

2. I am a former Member of Congress ("Member"). In 1974, I was elected to the U.S. House of Representatives ("House) from the Second Congressional District of the State of Colorado ("second district"). I represented this District through 1986. From 1987 through 1992, I served as a Senator for the State of Colorado in the U.S. Senate ("Senate"). In 1992, I decided not to run again for the U.S. Senate. During my approximately 18 years of Congressional service, I campaigned

for election or for re-election to federal office seven (7) times.

3. During my election campaigns, I raised funds for the Democratic Party to support my campaign.

4. By the early 1980s, I understood that the Colorado Democratic State Party was becoming progressively less capable of raising funds. Because I was successful at fundraising and could reach various constituencies effectively, I worked to raise funds for the state party.

5. When I solicited contributions for the state party, in effect I solicited funds for my election campaign. I understood that the solicitees who made contributions to the party almost always did so because they expected that the contributions would support my campaign one way or another, and for the most part they expected I would remember their contributions.

6. The chairman of the state party served at the pleasure of Democratic elected officials. He knew the amount of funds I had raised for the state party, and this helped me to participate in deciding how the party would spend its funds. For example, the party used some of the funds to finance a Get Out The Vote campaign ("GOTV") for the second district when I campaigned for the House seat, and for the entire state when I ran for the Senate seat in 1986. During the time I was in Congress, we tried to persuade other Democratic candidates for House seats in other congressional districts in Colorado to raise funds for the state party, to enable the party to finance similar GOTV campaigns in their respective districts. These coordinated GOTV

campaigns were important for Democratic candidates at all levels, and when properly operated, gave some leadership to the Members of Congress, and helped to knit together a naturally disparate party.

7. Although most of my experience in fundraising for the Democratic Party was for the state party, I also successfully solicited funds for a national party committee, the Democratic Senatorial Campaign Committee ("DSCC"). The DSCC required that I raise a certain amount of money for the committee before my campaign could receive DSCC funds. I knew how much I needed to raise because the DSCC applied a formula, depending on the size of a particular candidate's state, for fundraising and for expending funds in a race that it considered "marginal". A "marginal" race was one in which the candidate received 55 percent, or less, of the vote in the preceding election.

8. I understood that when I raised funds for the DSCC, the donors expected that I would receive the amount of their donations multiplied by a certain number that the DSCC had determined in advance, assuming the DSCC had raised other funds. For example, a donor might expect that for every dollar contributed to the DSCC I would receive $3 from the DSCC.

9. In this fundraising, I often solicited contributions to the DSCC from individuals or Political Action Committees (PACs) who already had "maxed" (contributed to my campaign committee the maximum amount allowed by federal law). I did so because as I remember, individual solicitees were allowed by law to contribute $20,000 to the DSCC in a calendar year,

whereas they were allowed to contribute to my campaign only $1,000 each for the primary election and the general election. I don't remember the size of the limitation on PACs.

10. This activity was a standard among most candidates, including me, to augment the $2,000 contribution limit for individual contributors to a candidate's campaign. While most individuals wouldn't contribute more than the $2,000 limit, those few who did were very welcome.

11. I solicited funds from corporate offices and law firms. It was easier for these entities to get together and, for example, have 20 lawyers give $1000 than try to contact each individual for a contribution. And from time to time an entity would simply give $20,000 to the DSCC, which made life easier for everyone.

12. For the most part the only reason the DSCC would have known what activities to finance in Colorado during my 1986 Senate race was from information it received from me or from my campaign committee. In addition to expending funds for aspects of my campaign, the DSCC hired experts to give advice and ideas for the campaign, and assisted my campaign's efforts in GOTV, media and polling. The national party committees also provided generic advertisements that several candidates could use in their campaigns, this was a practice more likely to be used in House rather than Senate races.

13. The DSCC also helped to coordinate political activities among candidates. For example, at a March 31, 1992 dinner hosted by Charles S. Robb, Senator

from Virginia and then Chairman of the DSCC, about 12 of the 16 Democratic Senators who faced re-election campaigns that year met for a "supper and strategy session." Most senators were accompanied by their senior staff. The Senators predominantly discussed re-election matters such as polling and target groups, rather that public policy issues before the Congress. This "supper and strategy session" served as one means by which the Senators shared experiences and exchanged information about what their opponents were doing (often the opposition ran similar attack programs in many states across the country), and we communicated campaign needs to a national party committee, the DSCC.

14. From time to time I introduced large donors to the national party committees. The Democratic Party was then the majority party in Congress and often these donors making large contributions to the party wanted to become acquainted with party leaders. The introductions also served as a mechanism for donors to meet chairmen of important congressional committees, such as the House Ways and Means Committee and the House Armed Services Committee. Democratic leaders, such as Representative John D. Dingell, chairman of the House Energy and Commerce Committee, and former Representative Tony Coelho, House Majority Whip, hosted dinners for large party donors to dine with Democratic Members of Congress. Former Representative Coelho also formed a House campaign committee called something like the "Chairman's Circle", which hosted dinners which supported the Democratic Congressional Campaign Committee.

15. The Democratic national campaign committees sometimes asked me to meet with large donors to the party whom I had not met before. At the party's request, I met with the donors. I understood that the donors' goal in making the large contributions was often to occasion meeting(s) with me or other prominent Democratic congressional leaders to press their positions on legislative issues. On these occasions, sometimes all I knew about the donor would be the issue in which he was interested.

16. One reason persons contributed to the party was to obtain help for their problems from Members. Obviously another purpose of such contributions was to secure the political decision the contributors favored, possibly by securing the votes of certain Members. In my Congressional experience, most of the largest contributors to the party committees customarily received more access to a Member than individuals who contributed only $1,000, or average constituents who gave little or not at all. It's pretty obvious that anyone who states that most donors give to a party for purely altruistic reasons is not being fully candid.

17. I believe that when a corporation contributed a large amount, to a party committee that, in turn, used its funds to support its candidates' campaigns, the corporation would obtain undue influence over these candidates. This occurred because, in my experience, the candidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns.

18. Members who planned to seek re-election also understood that, all other things being equal, it would

be helpful if they cast their votes in a way that helped their party, party committees, and thus these large donors. This was never explicitly stated, but it was certainly helpful to the party and therefore to one's own opportunities in the next election cycle.

19. I am aware of the print and broadcast media's disclosure of the sources of funds for campaign committees and party committees. Based on my experience and what I have read and seen, I believe that mere disclosure, without legal limits on what party committees may spend, is not sufficient to prevent either the reality or the appearance that a Member's votes are influenced by large donors to the party.

20. Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the forgoing is true and correct.

/s/ TIMOTHY E. WIRTH
TIMOTHY E. WIRTH

Executed on this 5 day of May, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CV 89 N 1159

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DEFENDANT/COUNTER-PLAINTIFF

REPORTER'S TRANSCRIPT
(HEARING ON CROSS MOTIONS FOR SUMMARY JUDGMENT)

PROCEEDINGS BEFORE THE HONORABLE EDWARD W. NOTTINGHAM, JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO ON THE 15TH DAY OF MAY, 1998 IN COURTROOM C-201 UNITED STATES COURTHOUSE, DENVER, COLORADO

APPEARANCES:

For the Plaintiff
and Counter-Defendant:

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* * * * *

committees from any other type of political committee that makes contributions to candidates by using the contributions of others, and because the Federal Election Commission has shown the parties and their donors have both the capacity and the opportunity to link dollars with political favors, this court should grant summary judgment in favor of the commission.

THE COURT: Well, don't you agree that Buckley did say that the restriction on speech was marginal?

MS. SEALANDER: That was about to be my next point, your Honor. Buckley did say that the restriction on speech, when you restrict the amount that can be contributed to a candidate, is only marginal. And contrary to the Colorado Party's assertions this afternoon, we showed evidence in other exhibits and in our facts that indicates that in many instances party-coordinated expenditures are no different than the writing of a check.

THE COURT: Well, let's talk about your facts. First of all, aren't all of these newspaper reports that you've submitted hearsay?

MS. SEALANDER: Yes, Your Honor, they would have been hearsay had we offered them for the truth of the matter asserted, but as we tried to explain, we offered them instead to illustrate the public perception—people read these newspapers—and the perception of the commentators who wrote the articles or sponsored the editorials.

* * * * *

PAUL SIMON DEPOSITION
FEC v. Colorado Republican FEC
June 18, 1997

* * * * *

Q. What I'm trying to now do is focus in on levels.

Do you believe that the million dollar authority that they had in the last election placed them in a position to corrupt you, if that's what they wanted to do?

A. Well, the answer is I have never promised anyone anything for any campaign.

Q. Sure.

A. They would know me well enough to know that if they were not very low key, I would resist strongly.

But when I talk about a million dollars, this is in an $8.4 million expenditure. If you go up to—if that million dollars was part of three million dollars, one third, that puts somebody under appreciable dependence and you are—I think you are getting on to very thin ice.

Whether you get on the thin ice when you go from a million to a million and a half, I can't quantify it precisely.

Q. All you can any is as the number goes up, the ice gets thinner?

A. That's exactly right.

Q. Now, I believe you indicated, though, that you could not recall any situation in which the party proposed a direct quid pro quo, we'll give you our support if you vote a particular way.

A. That is correct.

Q. Is that true in your congressional races as well as your Senate races?

A. Yes.

Q. Now, I've been told that the Senate is a sort of cozy club. I don't know whether that's true or not.

Have any of your fellow senators ever told you that the party made such a quid pro quo demand of them, you vote this way or we won't support your campaign?

A. I don't recall that happening. I'm not saying it didn't happen. I don't recall.

I think the committee chairs, whether it's the Senate or the House, would be aware that I would strongly resist anything like that. I think they would be smart enough not to try it on me, while they might be willing to try it on some others.

Q. You believe that the Democratic Committee chairs might be willing, in fact, to demand quid pro quo votes for Democratic Committee support?

A. I think they would be getting on dangerous ice legally if they were to do that. I doubt that it ever is quite that blunt, but you can do the same thing without being quite that blunt and without violating the law.

Q. You don't recall any of your fellow senators saying to you "All those guys have told me I've got to vote this way or they are not going to support me in the next campaign"?

A. I do not.

Q. What about individual contributors to your campaign? Did you ever encounter quid pro quo

demands from individual contributors?

A. The only time I can recall it being completely – this goes back to when I was in the state legislature.

Some cemetery group, of all people, came to me and said they had contributed $200 to my campaign and I voted against some legislation they wanted on headstones. I can't remember any of the details. I offered to return the $200. They declined that. That's the only time.

Now, I have had people say to me "We were good to you in the last campaign. We would sure appreciate your vote on this amendment or this bill." It is not very subtle.

Q. It sounded to me from what you just said and from reading your affidavit that there, to some extent, may be a continuum where the more directly the money is coming to you from the individual donor, the greater the potential is for some such coercive attempt to be made, is that fair?

A. I think you are correct, but I think you

have to be careful as you make that assumption.

I think if money goes to the party and then from the party to me there is a little bit of a safeguard.

But we have a situation – I happen to be co-chairing together with Bill Stratton, former Republican governor of Illinois, a group looking at public finance or the whole campaign finance.

Illinois has the weakest campaign finance laws of all 50 states right now. You name it, you can do it in Illinois, including taking all of your campaign – if I have campaign contributions and I want to pay for my daughter's college tuition, you can do it in Illinois.

In Illinois the party leaders, the legislative leaders – I mentioned today the state party being weak in Illinois. The state party is strong in Illinois in terms of the state legislature, not in terms of the United States Senate.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANT,

vs.

COLORADO REPUBLICAN FEDERAL CAMPAIGN
COMMITTEE, ET AL., DEFENDANT/COUNTER-PLAINTIFFS

Washington, D.C.

Wednesday, August 6, 1997

The deposition of TONY COELHO, called for examination by counsel for Counter-Defendant in the above-entitled matter, purusant to Notice, in the offices of the United States District Court, 3rd and Constitution Avenue, N.W., Washington, D.C., convened at 12:40 p.m., before Paula J. Eastes, a notary public in and for the District of Columbia, when were present on behalf of the parties:

* * * * *

support their candidates, that will tend to favor incumbents because incumbents do have other sources

of support, whereas challengers really need to look to the party.

Is that fair?

A. Yes. I think that is fair. I don't think that is farfetched. I think that to a great extent when you limit the role of the party, you basically are protecting the good old boy network, as opposed to reaching out.

Now, I think, in fairness, I could say that to some extent it may depend on who controls the apparatus too. It can be abused by the party. But I think on paper, in theory, most times it is a positive.

Q. While you were the head of the DCCC, did you ever persuade members to support the interests of big donors because they were big donors?

A. No.

Q. During the time that you were head of the DCCC, did you ever go to members and tell them you have to vote this way because that is what this big donor for the party wants you to do?

A. No, sir.

Q. During the time that you were head of the DCCC, did you have the power to coerce members to vote to support the interests of the big donors if you wanted to do it?

A. That is a hard question to answer.

I think I would say no, but I think people could interpret by not being willing to support somebody in a committee assignment or not willing to target a political race, that the potential abuse is there and this power, in

the hands of the wrong person, could be used negatively.

The answer to that question is in the wrong hands it could easily be yes, but, again, it goes back to my discussion earlier about the baseball game. I don't think that you can legislate to try to prevent the tyrannical leader from abusing the system. I think you have to permit a system that should function and hopefully, like in the case of Joe Cannon, the members rebelled and kicked the person out when they abused the process.

Q. You anticipated my question.

Are there mechanisms within the party for responding to such an abuse of power by a party leader?

A. Yes. And I would use a current situation to discuss it.

When Newt Gingrich got in trouble and had 11 members go against the leadership, Newt publicly said that he was going to run people against these people in the Republican primary.

Major blunder in my view because back home these individuals became heroes and instead of defeating these individuals, Newt was in effect creating independent power centers, which as a party leader you can't have.

Within two weeks he has withdrawn from that position and has directed the campaign chair to say there will not be a campaign against these individuals and there will not be an attempt to discipline.

We always had that difficulty. I had people in the leadership every time somebody wouldn't vote, quote, "the party position", there were people in our party who wanted to retaliate against them.

I always point out the famous example of what really helped us to punish Phil Graham by kicking him off the Budget Committee so that he quit his district and ran as a Republican and now is the United States Senator in the State of Texas and has made Texas into a competitive political state. If we had been wiser and more patient, Phil may still be a Democrat today.

I think you have to be careful. I think it can boomerang against you very, very easily and I have seen a number of occasions where a leadership has made major blunders and it has turned against them.

MR. KIRBY: Thank you very much.

That is all I have.

MS. SEALANDER: We have nothing further.

Thank you.

DEC 1 2000

Supreme Court, U.S.
FILED
DEC 1 2000
CLERK

No. 00-191

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a political party has a First Amendment right to make unlimited campaign expenditures in coordination with the party's congressional candidates, notwithstanding the limits on such coordinated expenditures imposed by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

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In the Supreme Court of the United States

No. 00-191

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 213 F.3d 1221. The opinion of the district court (Pet. App. 54a-91a) is reported at 41 F. Supp. 2d 1197. An earlier opinion of this Court in this case (Pet. App. 92a-142a) is reported at 518 U.S. 604. An earlier opinion of the court of appeals (Pet. App. 143a-162a) is reported at 59 F.3d 1015. An earlier opinion of the district court (Pet. App. 163a-180a) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2000. The petition for a writ of certiorari was filed on August 3, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 441a(d) of Title 2, United States Code, provides in pertinent part:

> (d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> * * * * *
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

STATEMENT

1. This case involves the application of the Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.*, to the campaign spending of political parties. The Act imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1000 to any federal candidate, and multicandidate political committees[1] no more than $5000, with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A).

Since its decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court has recognized a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his

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[1] A multicandidate political committee is "a political committee which has been registered under [2 U.S.C. 433] for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." 2 U.S.C. 441a(a)(4); see 11 C.F.R. 100.5(e)(3).

campaign." *FEC* v. *National Conservative PAC (NCPAC)*, 470 U.S. 480, 497 (1985); see also *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 903-904 (2000). In *Buckley*, the Court upheld the FECA's limitations on contributions, finding that they serve a compelling government interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; see *id.* at 23-38. The Court struck down the Act's restrictions on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47; see *id.* at 39-59.

The instant case involves a category of payments commonly known as "coordinated expenditures," see *Buckley*, 424 U.S. at 46, which involve direct interaction with the candidate (or his agents) but do not involve a transfer of funds to the candidate himself. The FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or her agents "shall be considered to be a contribution to such candidate." 2 U.S.C.

441a(a)(7)(B)(i).[2] See *Buckley*, 424 U.S. at 46 ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA").

The FECA authorizes the national and state committees of a "political party" to make coordinated expenditures on behalf of their federal candidates well in excess of the contribution limits that apply to other entities. 2 U.S.C. 441a(d)(1); see H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"). The term "political party" is defined to mean "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). In elections for the United States Senate, Section 441a(d) initially authorized each national or state party committee to expend the greater of $20,000 or two cents multiplied by the voting age population of the State in which the election is held. 2 U.S.C. 441a(d)(3)(A).[3]

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[2] "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

[3] As construed by the Federal Election Commission, Section 441a(d) permits a state party committee to make coordinated expenditures up to the limits set out in Section 441a(d)(2) and (3) in addition to the $5000 that can be contributed directly to the candidate. See 11 C.F.R. 110.7(b)(3); FEC Advisory Op. 1985-14, 2 Fed. Election Camp. Fin. Guide (CCH)

That limit is periodically adjusted for inflation. 2 U.S.C. 441a(c). By 1996, the coordinated party expenditure limit for the Senate election in Colorado had increased to approximately $171,000. C.A. App. 332. If a state party committee chooses not to make the coordinated expenditures that Section 441a(d) permits, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Comm.* (*DSCC*), 454 U.S. 27, 31-43 (1981).

2. The instant case arises out of an enforcement action filed by petitioner Federal Election Commission (FEC or Commission) against respondent Colorado Republican Federal Campaign Committee.[4] The gravamen of the enforcement action was that respondent's payment for an advertisement attacking the voting record of Tim Wirth—at that time a candidate for the Democratic nomination for United States Senator—was an "expenditure" within the meaning of the FECA. Pet. App. 144a-145a, 164a-166a. Under the FEC's interpretation of the statute, that expenditure was conclusively presumed to be coordinated with the Republican Party's candidate for the Senate, on the theory that political party committees were deemed to be "incapable of making

¶ 5819, at 11,186 n.5 (May 30, 1985). Thus, if a party committee's coordinated expenditures exceeded the limits established by Section 441a(d)(2) and (3), the excess expenditure could be treated, up to the amount of $5000, as an in-kind contribution falling within the limitations of 2 U.S.C. 441a(a)(2).

[4] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, 437g. Congress has authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437d(a)(6); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

'independent' expenditures in connection with the campaigns of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1; see Pet. App. 105a-106a. Because respondent had previously assigned its entire Section 441a(d) coordinated expenditure authority to the National Republican Senatorial Committee, the FEC found probable cause to believe that respondent had violated the FECA limits on coordinated expenditures. *Id.* at 147a-148a.

Respondent contested the enforcement action. It also asserted a counterclaim, arguing that Section 441a(d)(3) is facially violative of the First Amendment. The district court dismissed the enforcement action, holding that the payment at issue was not subject to the FECA limits because it was not made "in connection with" any federal election. See Pet. App. 166a, 171a-180a. The court declined to address respondent's First Amendment challenge. *Id.* at 166a, 180a. The court of appeals reversed, holding that the payment was subject to (and violative of) the FECA cap on party coordinated expenditures, and that the cap was constitutional. *Id.* at 143a-144a, 149a-162a.

3. This Court reversed, sustaining respondent's challenge to the FEC's enforcement action while declining to adjudicate respondent's counterclaim. Pet. App. 92a-142a (518 U.S. 604) (*Colorado I*).

a. Three Justices concluded that the payment in question was properly regarded as an "independent" rather than a "coordinated" expenditure because the Chairman of the Colorado Republican Party had approved the advertisement and had consulted only with party officials. See Pet. App. 98a-100a (518 U.S. at 613-614) (Breyer, J., joined by O'Connor and Souter, JJ.). The plurality noted that under *Buckley*, restrictions on independent campaign expenditures are presumptively violative of the First Amendment. *Id.* at 100a-101a. The plurality found no justification for subjecting political parties to restrictions on independent spending that

could not constitutionally be imposed upon other entities. *Id.* at 101a-105a. The plurality rejected the government's contention that expenditures made by a political party in support of its candidates can be conclusively presumed to be coordinated. *Id.* at 105a-110a.

The plurality declined to consider the argument, raised in respondent's counterclaim, that the FECA limits on political party expenditures are unconstitutional even as applied to expenditures that are in fact coordinated with the candidate. See Pet. App. 110a-114a. The plurality explained that neither the parties' briefs nor the opinions of the lower courts had focused on that question. *Id.* at 111a. It also observed that because many party coordinated expenditures are "virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)," *ibid.*, "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits," *id.* at 112a. In the plurality's view, the difficulty of the constitutional question, and the parties' failure to focus on it, "provide[d] a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question." *Id.* at 113a.

b. Four Justices would have struck down the FECA limits on party expenditures even as applied to expenditures that are in fact coordinated with the candidate. See Pet. App. 114a-119a (518 U.S. at 626-631) (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part); Pet. App. 119a-140a (518 U.S. at 631-648) (Thomas, J., joined in part by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part). Two Justices would have upheld the Commission's enforcement action. Pet. App. 140a-142a (518 U.S. at 648-650) (Stevens, J., joined by Ginsburg, J., dissenting).[5]

4. The case was remanded to the district court for further consideration of respondent's counterclaim. That counterclaim asserted that "the First Amendment forbids the government to limit [respondent's] coordinated expenditures. The FEC's attempts and intent to impose or enforce any limit on such coordinated expenditures are unconstitutional, unlawful, and void." J.A. 23. The district court granted respondent's motion for summary judgment and declared the FECA limits on party expenditures unconstitutional. Pet. App. 54a-91a.

a. The district court held that respondent had standing to challenge the FECA limits on party coordinated expenditures, see Pet. App. 69a-72a, and that respondent's claims were ripe for judicial review, see *id.* at 72a-74a. The court also held that Section 441a(d)'s application to coordinated expenditures was severable from its application (previously invalidated by this Court in *Colorado I*) to independent expenditures. See *id.* at 74a-76a. The district court explained that the "FECA contains a strong severability provision," *id.* at 74a (citing 2 U.S.C. 454), and it found "no evidence that Congress would have rejected [Section 441a(d)] as it applies to coordinated expenditures in the absence of a limit on independent expenditures," *id.* at 75a.

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[5] After this Court's decision in *Colorado I*, the Commission initiated a rulemaking and sought public comments to consider, *inter alia*, possible criteria for determining when spending by parties is coordinated. See Independent Expenditures and Party Committee Expenditure Limitations, 62 Fed. Reg. 24,367 (1997) (proposing revisions to 11 C.F.R. Pts. 100, 104, 109, 110). Although that part of the rulemaking had been held in abeyance pending ongoing litigation, the Commission solicited further public comments in December 1999. 64 Fed. Reg. 68,951-68,952, 68,955-68,956. The FEC has not yet proposed a final rule on that subject.

b. On the merits, the district court stated that "[t]he only permissible purpose for limitations on campaign expenditures is to prevent corruption or the appearance thereof." Pet. App. 79a. The court concluded that the FEC had failed to demonstrate a sufficient danger of actual or perceived corruption to justify the statutory limits on party coordinated expenditures. The court explained:

> [A] political party functions to promote political ideas and policy objectives over time and through elected officials. Given the purpose of political parties in our electoral system, a political party's decision to support a candidate who adheres to the [party's] beliefs is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt to exert improper influence. A candidate who does not wish to toe the party line is not excluded from participation in the political process or even in the party process. The FEC offers factual allegations which suggest that one party or the other withheld, or attempted to withhold, campaign funds from a candidate who expressed viewpoints or campaign tactics contrary to those thought preferable by the party. The court regards those as instances of the party and the candidate exercising their First Amendment rights. A party that refuses to fund a candidate who engages in what the party deems as undesirable campaign tactics is not reflecting corruption or the appearance of corruption.

Id. at 87a-88a (citation omitted). The district court entered a declaratory judgment "that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against [respondent]." *Id.* at 91a.

5. The court of appeals affirmed. Pet. App. 1a-53a.

a. The court of appeals acknowledged that "corruption or the appearance thereof are constitutionally sufficient justifications" for limits on coordinated campaign spending. Pet. App. 12a-13a. The court stated, however, that to establish the validity of Section 441a(d), "the FEC in this case must show that political parties through their spending authority corrupt or appear to corrupt the electoral process." *Id.* at 13a. The court expressed the view that

> [t]he opportunity for corruption or its appearance is greatest when the political spending is motivated by economic gain. * * * [P]olitical parties are diverse entities, one step removed from the candidate, and they exist for noneconomic reasons. Much like an advocacy group, a party functions "to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."

Ibid. (quoting *Massachusetts Citizens for Life*, 479 U.S. at 259). The court of appeals also stated that "[f]rom the birth of this republic into the 21st century, political parties have provided the principal forum for political speech and the principal means of political association." *Id.* at 13a.

The court of appeals held that the Commission had failed to establish a constitutionally sufficient justification for Section 441a(d)'s restrictions on coordinated party spending in federal campaigns. The court stated that "the premise of [the FEC's] theory, namely that political parties can corrupt the electoral system by influencing their candidates' positions, gravely misunderstands the role of political parties in our democracy." Pet. App. 20a. It explained that

> [p]olitical parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates. Parties are simply too large and too diverse to be corrupted by any

one faction. Evidence in the record demonstrates that the parties' hard money comes from individual donors who give, on average, less than $40 * * *.

Even if, as the FEC contends, party leaders subvert the greater will of the rank-and-file membership, we trust the members to replace their leaders. It is true that political parties have been involved in wrongdoing, dating back to the Tammany Hall machine. However, the electoral and litigation processes have always managed to right these wrongs. Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process.

Id. at 21a-22a (internal quotation marks omitted).

The court of appeals also rejected the FEC's contention that the limits on party coordinated expenditures are a permissible means of preventing circumvention of other FECA contribution limits. The court stated that "[v]igilant enforcement of [2 U.S.C.] § 441a(a)(8)," which provides that contributions earmarked for a candidate shall be treated as contributions to the candidate himself, "is a more appropriate and direct means to safeguard the integrity of the individual contribution limits." Pet. App. 23a. The court of appeals concluded that the challenged FECA provision "constitutes a significant interference with the First Amendment rights of political parties," *id.* at 24a (internal quotation marks omitted), and that "[t]he FEC has not demonstrated * * * that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process," *id.* at 25a.

b. Chief Judge Seymour dissented. Pet. App. 26a-53a. She stated that the panel majority had "create[d] a special category for political parties based on its view of their place

in American politics, a view at odds with history and with legislation drafted by politicians." *Id.* at 26a. She also expressed the view that the panel majority had "require[d] an improperly demanding level of proof from the FEC to support a contribution limit the Supreme Court has told us is presumably justified." *Id.* at 37a.

Chief Judge Seymour explained that Section 441a(d) reflected Congress's effort to balance competing interests by "permitting [parties] to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others," Pet. App. 38a, without leaving party expenditures wholly unconstrained. See *id.* at 38a-39a. She found "no support in the Constitution, [the FECA], or Supreme Court authority for the majority's notion that political parties are entitled to favored treatment when assessing a contribution limit that impacts their associational rights." *Id.* at 40a. She also observed that "[t]he FEC's position voices long-standing Congressional concerns that have animated the history of efforts to reform federal election financing, many of which were addressed to the evils arising from large contributions to political parties that put the parties in political debt to the donors, debts which were often paid by the parties' candidates." *Id.* at 44a. Chief Judge Seymour concluded that "*[a]s a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics.* Moreover, the majority is not at liberty to substitute its judgment for that of Congress on how best to balance the need to promote the role of political parties and to combat its potential for corruption." *Id.* at 50a (footnote omitted).

SUMMARY OF ARGUMENT

I. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld the FECA's limits on contributions to

candidates for federal office. Under the Act, a coordinated expenditure made in support of a federal candidate is treated as a contribution. In enacting 2 U.S.C. 441a(d), Congress sought to facilitate the parties' performance of their distinctive functions by authorizing party committees to make coordinated expenditures that would otherwise exceed the Act's limitations on contributions to candidates. Respondent's facial challenge to the Act's limitations on party coordinated expenditures can succeed only if those limitations are unconstitutional even as applied to coordinated expenditures that are the functional and constitutional equivalent of direct contributions to federal candidates. Because this Court has previously sustained the FECA's contribution limits against First Amendment challenge, and because the Act allows political parties to make much larger coordinated expenditures than other political committees, the FECA limits on party spending are presumptively constitutional.

II. Large coordinated expenditures by political party committees pose essentially the same risks of corruption as similar expenditures by other entities. Congress could reasonably conclude that large party-coordinated expenditures, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office. A candidate assisted by party-coordinated expenditures may, once elected or re-elected, be induced to take actions favorable to the individuals or political action committees who have contributed funds to the party, thereby in effect using the party as a conduit to evade the FECA limits on contributions to candidates. Alternatively, the candidate may be induced to favor the private interests or policy preferences of the party leaders who control the coordinated expenditures.

Even when individual party leaders conscientiously seek to use the influence generated by large coordinated expenditures not to advance their own interests or those of individual contributors, but to further the interests of the membership as a whole, Congress may legitimately choose to limit the extent to which large infusions of money may be used to achieve the party's objectives. Congress has reasonably concluded that the undue influence of large campaign contributions upon public policy is inherently subversive of democratic governance, regardless of the donor's motives. That judgment underlies the FECA contribution limits generally (whose application has never depended upon the motivation of the donor), and it is no less applicable to political parties.

III. Political parties have no favored constitutional status that would entitle them to an exemption from the spending limitations that apply to other potential donors. The Framers distrusted political parties and sought to devise governmental structures that would curtail their influence. Although the right to form and operate a political party is one aspect of the freedom of speech and association protected by the First Amendment, the Framers did not intend to create *special* privileges or incentives for partisan activity. The drafting and ratification history of the Constitution therefore provides no support for respondent's contention that the First Amendment entitles political parties to an exemption from the coordinated spending limits that apply to other voluntary associations.

Under the FECA, the distinguishing feature of a political party (as opposed to other organizations that endorse candidates for federal office and spend money in their support) is that the candidate is officially identified, on the ballot, as the party's nominee. Such official recognition on the ballot cannot plausibly be thought to expand the party's First Amendment rights by eliminating Congress's authority to impose coordinated spending limits that are validly applied to non-party political committees. To the contrary, when a political party assumes an official role in the State's electoral

machinery, it is typically subject to *greater* constraints than a political organization acting in a purely private capacity.

In enacting Section 441a(d), Congress sought to balance competing objectives by permitting parties to play an important role in federal campaigns without leaving party spending wholly unconstrained. That legislative judgment is entitled to substantial deference, particularly in light of Congress's intimate familiarity with the workings of our political system. Respondent's First Amendment claim would inappropriately restrict the authority of the federal and state governments to define and limit the role of the parties vis-à-vis other participants in ongoing public policy debates.

ARGUMENT

I. BECAUSE THIS COURT HAS PREVIOUSLY SUSTAINED THE FECA'S CONTRIBUTION LIMITS AGAINST FIRST AMENDMENT CHALLENGE, AND BECAUSE THE ACT ALLOWS POLITICAL PARTIES TO MAKE MUCH LARGER COORDINATED EXPENDITURES THAN OTHER POLITICAL COMMITTEES, THE FECA LIMITS ON PARTY SPENDING ARE PRESUMPTIVELY CONSTITUTIONAL

A. This Court Has Repeatedly Recognized The Authority Of Congress And The State Legislatures To Limit Monetary Contributions To Candidates For Public Office, Including Expenditures Made In Coordination With The Candidate

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court sustained Congress's determination that bribery and public disclosure laws were not a sufficient response to the threat of electoral corruption, and "that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28; see also *id.* at 30 ("Congress was justified in concluding that the

interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."). The Court in *Buckley* upheld both the $1000 limit on individual contributions imposed by the FECA and the Act's $5000 limit on contributions by a political committee to a single candidate. *Id.* at 58. The Court has since repeatedly referred, with evident approval, to the *Buckley* Court's holding that reasonable contribution limits are a constitutionally permissible means of preventing actual or apparent electoral corruption. See *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 196-197 & n.16 (1981) (plurality opinion). Most recently, the Court in *Nixon* v. *Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), relied on *Buckley* in upholding Missouri's $1000 limit (adjusted for inflation) on contributions by individuals or political committees to candidates for statewide office. See *id.* at 903-910.

The FECA provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or her agents "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i); see *Buckley*, 424 U.S. at 46 ("controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act"); *FEC* v. *National Conservative PAC (NCPAC)*, 470 U.S. 480, 492 (1985) (coordinated expenditures "are considered 'contributions' under the FECA"). That provision serves to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47; see *id.* at 46 (noting that donors might otherwise "avoid[] the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities"). Thus, the general

rule—which neither respondent nor the courts below have questioned in its application to persons other than political parties—is that a coordinated expenditure in support of a candidate for federal office is both statutorily and constitutionally indistinguishable from a direct payment of money to the candidate's campaign.

B. The FECA Permits Political Parties To Make Coordinated Expenditures In Support Of Their Candidates In Amounts Much Greater Than The Contribution Limits That Apply To Other Donors

As the dissenting judge in the court of appeals explained, Congress "recognize[d] the role political parties play in American politics and accorded them special treatment by permitting them to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others." Pet. App. 38a (Seymour, C.J., dissenting). The effect of 2 U.S.C. 441a(d) is not to impose special disadvantages on political parties. Rather, Section 441a(d) facilitates the parties' performance of their distinctive functions by authorizing state and national party committees to make coordinated expenditures that would otherwise exceed the Act's limitations on contributions to candidates.

The Act generally prohibits any "multicandidate political committee" from making contributions in excess of $5000 to any candidate for federal office. 2 U.S.C. 441a(a)(2)(A). Section 441a(d)(1) provides, however, that, "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," a national or state political party "may make expenditures in connection with the general election campaign of candidates for Federal office," subject to the monetary limits set forth in Section 441a(d)(2) and (3). The Conference Report accompanying the 1976 FECA amendments explains:

> This limited permission allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in subsections (a)(1) and (a)(2) of this provision.

H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976). As adjusted for inflation, the coordinated party expenditure limit for the 1996 Senate election in Colorado was approximately $171,000. See p. 6, *supra*.[6]

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[6] The Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, authorizes federal funding for presidential candidates who satisfy the statutory criteria. Under the Act, federal funds are paid directly to the candidate. 26 U.S.C. 9006(b). An earlier proposal to provide campaign funds to the political parties rather than to the candidates was changed so as to ensure, *inter alia*, that "a national committee of a political party will not be able to use control of a large Federal payment as a weapon to dictate party policies and strategies to * * * candidates and potential candidates." S. Rep. No. 714, 90th Cong., 1st Sess. 15 (1967).

Under the FECA, the national committee of a political party is permitted to make coordinated expenditures in support of its presidential candidate in an amount (two cents times the voting age population of the United States, adjusted for inflation, see 2 U.S.C. 441a(c), 441a(d)(2)) much greater than the contribution limits applicable to other donors. The court of appeals declined to address the constitutionality of the FECA limit on party coordinated expenditures in presidential campaigns. See Pet. App. 4a n.1.

C. Respondent Asserts A First Amendment Right To Make Unlimited Coordinated Expenditures In Support Of Its Federal Candidates, Including Coordinated Expenditures That Are Functionally And Constitutionally Indistinguishable From Direct Monetary Contributions

Respondent's counterclaim asserted that "the First Amendment forbids the government to limit [respondent's] coordinated expenditures. The FEC's attempts and intent to impose or enforce any limit on such coordinated expenditures are unconstitutional, unlawful, and void." J.A. 23; see J.A. 24 (requesting "[a] declaratory judgment pursuant to 28 U.S.C. § 2201 that [respondent] has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void."). The district court agreed, entering a declaratory judgment "that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against [respondent]." Pet. App. 91a. The court of appeals affirmed, holding that "§ 441a(d)(3)'s limit on party spending is not closely drawn to the recognized governmental interest but instead constitutes an unnecessary abridgment of First Amendment freedoms." *Id.* at 25a-26a (internal quotation marks omitted). Thus, the effect of the court of appeals' decision is that respondent's coordinated expenditures in support of candidates for federal office are subject to no FECA limitation whatever.

The concept of a "coordinated expenditure" covers a variety of financial arrangements between a candidate and her supporters, many of which are functionally and constitutionally indistinguishable from direct contributions to candidates for federal office. Respondent's own expert stated, with respect to the national parties' coordinated expenditures, that "[t]he predominant approach is to provide

candidates with the funding needed to broadcast their messages or post letters to selected voters within their districts." J.A. 209. The Court in *Buckley* recognized the need "to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. at 46. Citing *Buckley*, the plurality in *Colorado I* observed that "many [coordinated] expenditures are * * * virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)." Pet. App. 111a; see also *id.* at 112a (noting that "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits").

This Court has not attempted to define the full range of circumstances under which a campaign expenditure may properly be treated as "coordinated." The instant case, however, involves solely a facial challenge, in which respondent successfully requested a declaratory judgment that it "has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void." J.A. 24. Respondent is not entitled to that relief unless the FECA limits on party coordinated expenditures are unconstitutional even as applied to expenditures that are the functional equivalent of direct contributions.[7]

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[7] Even in a First Amendment challenge,

> [f]acial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973); see also *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail, [the plaintiff] must

Thus, the question in this case is whether political parties are constitutionally entitled to a *blanket* exemption from the limits on coordinated campaign spending—squarely upheld by this Court in *Buckley*—that apply to all other entities, including other political committees. For the reasons set forth below, party committees have no such constitutional right. We explain in Part II that large coordinated expenditures by political parties pose essentially the same risks of corruption as similar expenditures by other entities. We explain in Part III that political parties do not enjoy a favored constitutional status that would entitle them to an exemption from generally applicable spending limits.[8]

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demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See *Broadrick*, *supra*, at 615.

NEA v. *Finley*, 524 U.S. 569, 580 (1998). The FECA statutory limit on party coordinated expenditures "contemplates a number of indisputably constitutional applications." *Id.* at 584.

[8] As the district court correctly held (Pet. App. 74a-76a), Section 441a(d)'s application to coordinated expenditures is severable from its application (previously invalidated by this Court in *Colorado I*) to independent expenditures. The FECA provides that "[i]f any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby." 2 U.S.C. 454. There is, moreover, nothing remotely anomalous about a statutory scheme in which political parties are permitted to make unlimited independent expenditures but are subject to dollar limits on their coordinated campaign spending. To the contrary, that is precisely the regime to which individuals and non-party political committees are subject as a result of this Court's decisions in *Buckley* and its progeny. See pp. 3-4, *supra*. In the court of appeals, respondent abandoned the contention that Section 441a(d)'s application to coordinated expenditures cannot be severed from its application to independent spending. See Pet. App. 8a n.3.

II. UNLIMITED COORDINATED EXPENDITURES BY POLITICAL PARTIES IN SUPPORT OF FEDERAL CANDIDATES WOULD CREATE A SUBSTANTIAL RISK OF ACTUAL OR APPARENT CORRUPTION

As the Court explained in *Shrink Missouri*,

> [i]n speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," [the Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind [the Court's] recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28). It is reasonable to assume that large coordinated expenditures by political parties, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office. Indeed, the Court in *FEC* v. *Democratic Senatorial Campaign Comm. (DSCC)*, 454 U.S. 27 (1981), observed that "effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party." *Id.* at 42; see also *Alaska* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 626 (Alaska 1999) ("The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself."), cert. denied, 120 S. Ct. 1156 (2000). In enacting Section 441a(d), Congress evidently concluded that the use of campaign spending as a means of party discipline, if kept within acceptable bounds, would have salutary rather than corrosive effects. That

determination does not undermine Congress's judgment that *unlimited* party coordinated expenditures pose the same danger—*i.e.*, the risk of actual or perceived "improper influence" (*Shrink Mo.*, 120 S. Ct. at 905) based on financial largesse—as unrestricted campaign contributions by individuals or non-party committees.

The court of appeals did not question the proposition that party coordinated expenditures may be used as a means of influencing a legislator's performance of her official responsibilities. The court concluded, however, that because the essential function of parties is to facilitate the election of candidates who will implement the party's platform—a function that necessarily involves efforts to influence the behavior of the candidate once he has been elected to office —the exercise of such influence through coordinated spending cannot properly be regarded as a form of "corruption." See Pet. App. 22a ("Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process.") (internal quotation marks omitted).

The court of appeals' analysis underestimates the potential for abuse inherent in large-scale spending by political parties, and it misconceives the underlying justification for contribution limits generally. The premise of the FECA contribution caps is not that a private person's "influence" with government officials is per se illegitimate. Rather, the premise is that such influence should not be based on large infusions of *money*. That judgment applies with full force to coordinated expenditures directed by political party officials.[9]

[9] As the Court noted in *Buckley*, the FECA's contribution limits were originally based in part on two purposes—the desire "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections," 424 U.S. at 25-26, and the belief that "the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money," *id.* at 26—in addition to the prevention of actual and perceived corruption. The Court in *Buckley* held that those purposes did not constitute compelling governmental interests that could justify the Act's restrictions on independent expenditures. *Id.* at 55-57. The Court concluded, however, that "[i]t is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

Shortly after *Buckley* was decided, Congress amended and reenacted the FECA, including Section 441a(d)'s provisions dealing specifically with campaign expenditures by political parties. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475. Thus, whatever combination of factors may have initially motivated Congress to limit party expenditures, Congress chose to retain those limits after this Court's decision in *Buckley* circumscribed the constitutionally permissible objectives that could justify such caps.

A. Large Party Coordinated Expenditures May Be Used To Circumvent The FECA Limits On Individual Contributions To Candidates, And Thereby To Advance The Interests Of The Party's Major Donors

Party-coordinated expenditures often serve as a conduit to channel contributions from individuals or political action committees, to the benefit of particular candidates. If party committees were permitted to make unlimited coordinated expenditures, this use of the party as a conduit would facilitate evasion of other FECA contribution limits, and raise precisely the same potential for corruption that those limits were designed to avoid. Thus, an individual or political action committee that has already contributed the maximum $1000 or $5000 directly to the candidate could contri-

bute additional amounts to one or more party committees,[10] and could in various ways communicate the expectation that all or part of those sums would be used for coordinated expenditures in support of the candidate. When the candidate is aware of the nexus between the contribution to the party and the party-coordinated expenditures,[11] that sequence of payments creates the very danger that the underlying limits on contributions to candidates are intended to prevent—*i.e.*, the fact or appearance of "improper influence" resulting

[10] Although an individual can contribute no more than $1000 per election to a candidate for federal office, she can contribute up to $5000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political committee operated by a national political party. 2 U.S.C. 441a(a)(1)(A)-(C). A political action committee can contribute no more than $5000 per election directly to a candidate for federal office. 2 U.S.C. 441a(a)(2)(A). Such an organization can contribute additional sums of up to $15,000 to a political committee established by a national political party, and up to $5000 to a state political party committee. 2 U.S.C. 441a(a)(2)(B) and (C).

[11] As the district court recognized, evidence submitted by the FEC in this case indicates that "party committees keep track of the Member of Congress who is responsible for contributions to the campaign committees," and that "[m]any, although not all, Members of Congress raise money on behalf of the party from contributors who have already given the maximum permissible amount to the individual candidate's campaign." Pet. App. 65a. The evidence further indicates that "the parties take into consideration the fund-raising efforts of candidates in deciding allocations of campaign funds," and that "[c]andidates in need of funding do request assistance and attempt to lobby those with control over allocations." *Id.* at 66a. See also *id.* at 46a (Seymour, C.J., dissenting) ("Senators are expected to encourage their major donors, who have maximized their contribution to the candidate, to make contributions to the state or national party, which in turn gives the candidates money for their campaigns."); J.A. 165-166, 246-247, 274-275; C.A. App. 457, 635.

from payments to "politicians too compliant with the wishes of large contributors." *Shrink Mo.*, 120 S. Ct. at 905.[12]

The pertinent legislative history reflects congressional concern about the potential corruptive effects of campaign spending by political parties—and, in particular, the danger that large party contributions could be used as a means of

[12] As early as 1924, one Senate leader explained that

> "one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively."

United States v. *United Auto. Workers*, 352 U.S. 567, 576-577 (1957) (quoting 65 Cong. Rec. 9507-9508 (1924) (statement of Sen. Robinson)). As the dissenting judge below recognized, the current FECA limits on party coordinated expenditures reflect "long-standing Congressional concerns that have animated the history of efforts to reform federal election financing, many of which were addressed to the evils arising from large contributions to political parties that put the parties in political debt to the donors, debts which were often paid by the parties' candidates." Pet. App. 44a (Seymour, C.J., dissenting).

Of course, the means by which party leaders can influence the official behavior of their candidates in office have changed considerably since the beginning of this century. In an era when the party's nominees were chosen by the leadership rather than through primary elections, those leaders possessed a greater ability to dictate the behavior of elected officials. But as the passage quoted above makes clear, the danger at which Section 441a(d) is in part directed—*i.e.*, that party leaders will use whatever methods of influence are available to induce elected officials to take positions favorable to the party's major donors—is a matter of longstanding concern.

evading statutory limits on individual donations. That concern was expressed during Senate debate in 1973 on a predecessor bill to the one finally enacted in 1974. Senator Mathias explained:

> We have controlled the line which runs from the individual to the candidate to a $3,000 limit. We have controlled or limited the flow from a political committee to a candidate to $5,000. We have limited or controlled the line which flows from an individual to a political party to $100,000.
>
> But what this amendment really goes to is one of the areas which is not controlled, and that is from the party to the candidate. That, of course, is a wide open avenue. An [individual] who could contribute $100,000 to a party could well envision that that money, by some arrangement, would be directed to a candidate. Such arrangements are not unknown. They may be informal, but earmarking would be possible. This amendment would prevent that kind of indirect contribution of $100,000 to a single candidate by a single contributor. I think it is a loophole which needs to be looked at very carefully.

119 Cong. Rec. 26,321 (1973).[13] Senators Kennedy and Pastore observed, based on their prior experience as legislators,

[13] The amendment to which Senator Mathias referred was offered by Senator Stevenson (see 119 Cong. Rec. at 26,320) and would have had the effect of subjecting party committees to the same spending limits as other political committees. See *id.* at 26,321 (Senator Stevenson states that the amendment would "have the effect of equalizing the amount to party political committees and all other political committees"). The bill ultimately enacted in 1974 permits political parties to make substantially larger coordinated expenditures in support of federal candidates than other political committees are allowed to make. See 2 U.S.C. 441a(d); pp. 5-6, 18-19, *supra*. The FECA also places lower limits on individual contributions to candidates and to political parties than the predecessor bill discussed by Senator Mathias. See 2 U.S.C. 441a(a)(1).

that through unspoken understandings donors could achieve the result that Senator Mathias described—*i.e.*, using the party as a conduit for large contributions to candidates without any explicit earmarking of funds. See *id.* at 26,323, 26,323-26,324. Although the provisions ultimately enacted in 1974 differed in some respects from those debated during the previous year (see note 13, *supra*), the 1973 debate casts significant light on the interests that Section 441a(d) was intended to serve.

The court of appeals acknowledged (Pet. App. 22a) that "if an individual used the party as a conduit to channel money to specified candidates, this would certainly threaten the integrity of the individual contribution limit." The court suggested (*id.* at 23a), however, that concerns regarding the possible circumvention of other FECA limits could adequately be addressed through "[v]igilant enforcement of [2 U.S.C.] § 441a(a)(8)," which provides that contributions "earmarked or otherwise directed through an intermediary or conduit" shall be treated as contributions to the candidate herself. This Court has previously recognized, however, that the earmarking provision of Section 441a(a)(8) does not provide a complete response to the danger that contributions to political committees may be used to evade the FECA limits on contributions to candidates.

Thus, in *Buckley*, the Court upheld the FECA's $25,000 annual aggregate limit on individual contributions, despite the fact that it imposed "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." 424 U.S. at 38. The Court explained that the $25,000 aggregate limit was "a corollary of the basic individual contribution limitation" that restricts the possibility of evasion "by a

person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.* The Court employed a similar analysis in *California Medical Ass'n*, where it upheld the $5000 limit on contributions to political committees, see 2 U.S.C. 441a(a)(1)(C), as a reasonable means of preventing circumvention of the limits on contributions to candidates. The plurality explained that if contributions to political committees were unrestricted, "an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee." 453 U.S. at 198. The plurality found it "clear that this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*." *Id.* at 199. Justice Blackmun similarly "conclude[d] that contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*." *Id.* at 203 (Blackmun, J., concurring). Those decisions refute the court of appeals' suggestion (see Pet. App. 23a) that "[v]igilant enforcement of § 441a(a)(8)" is the only constitutionally

permissible means of preventing the use of intermediaries to circumvent the individual contribution limits.[14]

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[14] As the dissenting judge in the court of appeals observed, "[t]he record [in this case] * * * reveals that although earmarking funds for a particular candidate is illegal, this prohibition is circumvented through 'understandings' regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote." Pet. App. 46a (Seymour, C.J., dissenting). A former official of the Democratic Senatorial Campaign Committee (DSCC) explained that "[t]he Senators who solicited the money for the DSCC could not promise that the money would be used directly in support of their own or another particular campaign, because earmarking contributions was prohibited. However, that did not mean that Senators who raised money could not be assured that they would get a significant return from their efforts. There appeared to be an understanding between the DSCC and the Senators that the amount of money they received from the DSCC was related to how much they raised for the Committee." J.A. 165-166; see J.A. 166 (same former official states that "[p]eople often contribute to party committees because they have given the maximum amount to a candidate, and want to help the candidate indirectly by contributing to the party"). Another individual who had served first as a Democratic Party official and then as National Finance Director for Tim Wirth's 1986 Senate campaign explained that the DSCC employed a "tally system," which he described as "an informal agreement between the DSCC and the candidates' campaigns that if you help the DSCC raise contributions, we will turn around and help your campaign." J.A. 246. He stated that during the 1986 Senate race, "[w]e also told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum § 441a(d) allocation from the DSCC." J.A. 247. Senator Wirth himself stated, "[w]hen I solicited contributions for the state party, in effect I solicited funds for my election campaign. I understood that the solicitees who made contributions to the party almost always did so because they expected that the contributions would support my campaign one way or another, and for the most part they expected I would remember their contributions." J.A. 273. A former campaign aide to Senator Wyche Fowler explained that "[i]n raising money for the DSCC, we mostly went back to contributors who had already given the maximum allowable

Under current federal law, moreover, an individual may donate unlimited amounts of so-called "soft money" to political parties. See Pet. App. 102a. Because "soft money" cannot lawfully be spent to influence federal elections, the party cannot (even under the court of appeals' decision) use those donations to make coordinated expenditures on behalf of candidates for federal office. Large soft money donations may, however, be used to induce the party to make large coordinated expenditures with funds acquired from other ("hard money") sources.[15] Those coordinated expenditures may in turn be used to induce elected officials to look favorably upon the soft money donor. The FECA limits on party coordinated expenditures serve to break that chain, thereby helping to prevent circumvention of the statutory limits on individual contributions to candidates.

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contribution to Mr. Fowler's campaign. While we were not able to tell these contributors that the money could come back directly to help us, we knew that this was part of the effort to demonstrate our viability to the DSCC, to show that we were worthy of their help. In that way the money contributed was certainly an indirect help to Mr. Fowler." C.A. App. 457. Former Senator Paul Simon testified in his deposition that "[t]he tally system is a way of contributing that does not violate the law [against earmarking] but comes close to violating the law. * * * They always made clear that this is not just automatic, so no one could say if Tom Smith contributed $5,000 to the DSCC, that was a way of laundering it coming to Paul Simon, but you knew that if you got your tally, even though you might be in a safe seat, you would get your money." *Id.* at 635.

[15] One former Democratic Party official explained that "[i]f people start giving $50,000, $100,000, or $500,000 to a party committee, even if that is soft money, they would probably expect a greater voice in how that money was spent and what they would want in return. It is unrealistic to think that if I give you a check for $500,000, I will not expect you to make the largest possible contribution to my favorite candidate who can do the most for my legislative concerns." J.A. 260.

B. Large Coordinated Expenditures May Be Used To Advance The Interests Of The Individual Party Officials Who Control The Disposition Of Party Funds

"In the nature of things, a [party] committee must act through its employees and agents." *DSCC*, 454 U.S. at 33. Even when party funds are raised from a large number of contributors, the record in this case indicates that small groups of party officials may have de facto control over the manner in which those funds are spent. See J.A. 164 (former Executive Director of the Democratic Senatorial Campaign Committee (DSCC) explains that during his tenure, the DSCC's three-member Executive Committee "basically made the decisions as to how to distribute the money"). As a result, candidates who benefit from large coordinated expenditures may feel indebted not to the party as an abstract entity, but to the individual party officials who cause those expenditures to be made. Party leaders may thereby acquire the ability to induce the candidates (once elected or re-elected) to take actions favorable to the leaders' own private interests or policy preferences.[16]

There is no reason to believe that political party officials are immune from the corrupting temptations and self-interest of other persons. To the contrary, history demonstrates

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[16] The two major parties' senatorial campaign committees have traditionally been headed by incumbent Senators chosen by the parties' Senate leadership. See J.A. 163-164, 246, 249, 252, 253, 262-263, 275-276; C.A. App. 486. As the DSCC's former Executive Director explained, "[t]aking away the limits on coordinated expenditures would result in a fundamental transferal of power to certain individual Senators." J.A. 168. Reasonable people may disagree regarding the appropriate balance between leadership control and individual discretion within a legislative body. But party leaders within the legislature cannot plausibly claim a constitutional *right* to utilize large coordinated expenditures in support of other candidates as a means of strengthening their control.

that individual officials of political organizations are particularly well-situated to exert a corrupting influence upon candidates and officeholders in order to advance their private interests. See generally, *e.g.*, *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 88 n.4 (1990) (Stevens, J., concurring). The court of appeals acknowledged that "political parties have been involved in wrongdoing, dating back to the Tammany Hall machine," but it concluded (without citation) that "the electoral and litigation processes have always managed to right these wrongs." Pet. App. 22a. The propriety of the FECA's coordinated expenditure limits does not depend, however, on proof that without such limits electoral abuses would permanently go unchecked. Nor does it depend on proof that party officials will typically utilize their control over party funds to advance a personal agenda. The Court in *Buckley* assumed "that most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court nevertheless sustained the $1000 limit on individual contributions, explaining that it is "difficult to isolate suspect contributions," and that "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30; see *National Right to Work Comm.*, 459 U.S. at 210 (Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared").

C. Congress May Impose Reasonable Contribution Limits In Order To Reduce The Influence Of Money On The Behavior Of Elected Officials, Regardless Of The Motivation Of The Donor

As the foregoing analysis indicates, large party coordinated expenditures may be used to induce elected officials to

favor the private interests either of the party's major contributors or of individual party officers. Use of coordinated expenditures to achieve those ends is a paradigmatic example of the "improper influence" (*Shrink Mo.*, 120 S. Ct. at 905) that the FECA contribution limits are intended to prevent. But the validity of Section 441a(d) does not ultimately depend upon the likelihood of such blatant abuses. Even when individual party leaders conscientiously seek to further the interests and values of the membership as a whole, Congress may legitimately choose to limit the extent to which large infusions of *money* may be used to achieve those objectives.

As the Court explained in *Shrink Missouri*,

> [i]n speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," [the Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind [the Court's] recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28). Congress's authority to "address the power of money 'to influence governmental action'" (*ibid.*) does not depend on the motivation of the donor. The wealthy individual who pays a large sum as an explicit *quid pro quo* for a legislator's vote is guilty of bribery, whether the payor has a pecuniary or similar tangible interest in the passage or defeat of the proposed legislation, or instead is motivated solely by ideological concerns. With respect to methods "less 'blatant and specific' than bribery" (*ibid.*), Congress has similarly concluded that the undue influence of large campaign

contributions upon public policy is inherently subversive of democratic governance, regardless of the donor's motives.

In explaining its conclusion that party coordinated expenditures are unlikely to have corruptive effects, the court of appeals stated that

> [t]he opportunity for corruption or its appearance is greatest when the political spending is motivated by economic gain. * * * [P]olitical parties are diverse entities, one step removed from the candidate, and they exist for noneconomic reasons. Much like an advocacy group, a party functions "to disseminate political ideas, not to amass capital."

Pet. App. 13a (quoting *Massachusetts Citizens for Life*, 479 U.S. at 259). The distinction drawn by the court of appeals has no basis in law. Neither the text of the FECA nor this Court's precedents suggest that the applicability or constitutional status of the Act's coordinated expenditure limits turns on whether the overall character of the contributing organization, or its motive in making a specific expenditure, is economic in nature.[17]

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[17] One commentator explains:

> FECA's dollar limits on individual and PAC contributions apply equally to donations by advocacy organizations or ideologically-minded individuals as to organizations and individuals with economic agendas for giving. The Supreme Court has never suggested that ideological contributions are constitutionally immune from dollar limitation. There is thus no basis in the Supreme Court's campaign finance jurisprudence for [the court of appeals'] determination [in this case] that restrictions on party contributions are subject to more stringent scrutiny because parties are ideological organizations—even if it is assumed that the parties are primarily ideological organizations.

Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 664 (2000).

The court of appeals' reliance on *Massachusetts Citizens for Life* is wholly misplaced. The Court in that case relied on the distinctive attributes of a particular corporate entity—including the fact that the organization "was formed for the express purpose of promoting political ideas, and cannot engage in business activities," 479 U.S. at 264—as a basis for holding that the organization was constitutionally entitled to make *independent* campaign expenditures. Of course, under this Court's decision in *Colorado I*, party committees are similarly free to make unlimited independent expenditures in support of their candidates for federal office. But nothing in *Massachusetts Citizens for Life* suggests that an organization's "political" (as opposed to "economic") orientation entitles it to a constitutional exemption from the FECA limits on *coordinated* campaign spending. To the contrary, the Court in *Massachusetts Citizens for Life* specifically distinguished its prior decision in *National Right to Work Committee* on the ground that "the political activity at issue in that case was contributions," and it observed that the Court "ha[s] consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." 479 U.S. at 259-260.

The court of appeals also stated that "[p]olitical parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates." Pet. App. 21a; see *id.* at 22a ("we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process") (internal quotation marks omitted). The court was surely correct in stating that political parties may legitimately seek to influence the official behavior of their members. There is no inconsistency, however, between that principle and the imposition of reasonable coordinated spending limits.

The justification for imposing contribution limits upon individuals or non-party political committees is not that persons outside the government should be prevented from exerting "influence" over federal policy. To the contrary, individuals have a constitutional right "to petition the Government for a redress of grievances," U.S. Const. Amend. I, and "to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); see also *NCPAC*, 470 U.S. at 498 ("The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view."). The FECA limits on contributions made by individuals and non-party political committees reflect Congress's judgment that a legislator's conduct should not be affected by an actual or anticipated infusion of *money*—not a suspicion of private influence per se. That judgment is no less applicable to political parties than to other potential donors.[18]

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[18] As Justice Thomas explained in his separate opinion in *Colorado I*, "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." Pet. App. 138a (518 U.S. at 646). It does not follow, however, that a political party is incapable of "corrupting" its candidates. No one (to our knowledge) suggests, for example, that a party committee has a constitutional right to offer money as an explicit *quid pro quo* for a legislator's vote on a particular measure. Although the party's *objective* of influencing the official behavior of its candidates is wholly legitimate, the federal bribery laws validly limit the *means* by which that objective may be achieved. Cf. Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comm. 127, 138 (1997) ("The reason we make bribery illegal is that we don't want officials to be affected by monetary considerations, not that we have a particular animus against deal-making."). The congressional policy judgment reflected in Section 441a(d)—*i.e.*, that a party committee should have only a limited ability to use coordinated campaign expenditures as a *means* of influencing its members—is similarly valid.

III. POLITICAL PARTIES HAVE NO FAVORED CONSTITUTIONAL STATUS THAT WOULD ENTITLE THEM TO AN EXEMPTION FROM THE SPENDING LIMITATIONS THAT APPLY TO OTHER POTENTIAL DONORS

In deciding how to exercise his official responsibilities, a Member of Congress will be influenced by a wide variety of considerations. Those will include the Member's own moral and political values and her independent perception of the public interest; the views of her constituents; the beliefs of prominent persons (*e.g.*, major employers, union leaders, newspaper publishers and editors) within the State or district; and the preferences of party leaders. Neither history nor precedent suggests that political party committees have a favored constitutional status that would entitle them to utilize a mode of influence—large coordinated expenditures in support of candidates for federal office—that other participants in the public dialogue are forbidden to employ.

A. The Framers Distrusted Political Parties And Did Not Intend To Vest Them With Any Favored Constitutional Status

"Partisan politics bears the imprimatur only of tradition, not the Constitution." *Elrod* v. *Burns*, 427 U.S. 347, 369 n.22 (1976) (plurality opinion). Commenting on the political beliefs of such men as Washington, Adams, Madison, Hamilton, and Jefferson, the historian Richard Hofstadter has written: "If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." Richard Hofstadter, *The Idea of a Party System* 3 (1970). The Framers "equated parties

with divisiveness, disruption, and conspiracy against government. The Constitution had not anticipated parties and had made no provision for their existence. In the *Federalist* papers Madison had stressed the argument that the Constitution would, in fact, control 'the violence of faction.'" Noble E. Cunningham, Jr., "The Jeffersonian Republican Party," in 1 *History of U.S. Political Parties* 240 (A. Schlesinger ed., 1973); see The Federalist No. 10, at 77 (J. Madison) (Clinton Rossiter ed., 1961).

Any reference to the Framers' distrust of political parties is subject to at least two important caveats. First, although the Framers were concerned about the potentially deleterious effects of parties, they did not seek to suppress partisan activity directly. Rather, recognizing that direct suppression of parties would entail unacceptable threats to liberty,[19] they sought instead to devise governmental structures that would have the practical effect of curtailing the parties' influence. As one eminent political scientist has explained:

> [T]he Convention at Philadelphia produced a constitution with a dual attitude: it was proparty in one sense and antiparty in another. The authors of the Constitution refused to suppress the parties by destroying the fundamental liberties in which parties originate. They or their immediate successors accepted amendments that guaranteed civil rights and thus established a system of party tolerance, i.e., the right to agitate and to organize. This is the proparty aspect of the system. On the other hand, the authors of the Constitution set up an elaborate division and balance of powers within an intricate governmental structure designed to make parties ineffective. It was hoped that the parties would lose and exhaust themselves in futile attempts to fight their way through the labyrinthine framework of the government, much as an attacking army is expected to spend itself against the defensive works of a fortress. This is the antiparty part of the constitutional scheme.

E.E. Schattschneider, *Party Government* 7 (1942) (footnotes omitted).

Second, notwithstanding the Framers' philosophical objections to political parties, partisan activity has been an important feature of American political life for nearly all of the Nation's history. "The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic Party* v. *Jones*, 120 S. Ct. 2402, 2408 (2000); see Cunningham, *supra*, at 240 ("In a single decade, then, the nonparty conditions which had existed when Washington took office had been replaced by a two party system"); Hofstadter, *supra*, at 4 (although "[t]he Founding Fathers had inherited a political philosophy which * * * denied the usefulness of parties and stressed their dangers," the Framers "deeply believed in the necessity of checks on power, and hence in freedom for opposition, and were rapidly driven, in spite of their theories, to develop a party system.").

Thus, the historical evidence amply supports this Court's repeated holdings (see, *e.g.*, *California Democratic Party*,

---

[19] Thus, Madison acknowledged that one possible "method[] of removing the causes of faction" was to "destroy[] the liberty which is essential to its existence." The Federalist No. 10, *supra*, at 78. Madison vigorously opposed that approach, however, explaining:

> It could never be more truly said than of [that] remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

Ibid.

120 S. Ct. at 2408; *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 214 (1986)) that the freedom of speech and association protected by the First Amendment encompasses the right to form and operate a political party. The question in the instant case, however, is whether the First Amendment entitles political parties not only to exist and to advocate, but also to an exemption from the coordinated spending limits that apply to other organizations, including organizations whose principal function is political advocacy. The drafting and ratification history of the Constitution provides no support for that proposition. The Framers regarded political parties as an inevitable feature of a free society, but they did not intend to create special privileges or incentives for partisan activity.

As we explain above, the evil at which the FECA spending limits are directed is not private influence per se, but influence exerted through financial largesse. Respondent asserts a constitutional right not simply to exert "influence over the positions of its candidates" (Pet. App. 22a), but to employ a *means* of influence that is forbidden to other participants in the political fray. Reasonable people may surely believe that the stability and efficacy of the federal government will be increased if elected officials are encouraged, in balancing the demands of competing constituencies (see p. 39, *supra*), to display primary loyalty to the party leadership. But the Framers clearly did not intend to enshrine that preference in the Constitution.

B. The Formal Role Of Political Parties In The States' Electoral Process Has Traditionally Been Treated As A Ground For Increased State Regulation, Not As A Basis For Heightened First Amendment Protection

The FECA defines the term "political party" to mean "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). Thus, under the Act, the distinguishing feature of a political party (as opposed to other organizations that endorse candidates for federal office and spend money in their support) is that the candidate is officially identified, on the ballot, as the party's nominee.

The modern practice, in Colorado and among the States generally, is that the major political parties are entitled by law to have their nominees placed upon the ballot, and the candidates are identified on the ballot by party affiliation.[20]

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[20] One commentator explains that the States typically "grant[] preferential ballot access to the nominees of political parties, thereby making party nomination a kind of 'feeder' into the state's official political system. Every state grants access to the general election ballot to the nominees of political parties that satisfy certain conditions, conditions that typically differ from those that independent candidates must satisfy." Laurence H. Tribe, *American Constitutional Law* § 13-23, at 1121 (2d ed. 1988). Under Colorado law, the nominees of all "political parties" are placed on the ballot for all "partisan elections." Colo. Rev. Stat. Ann. § 1-5-404(1) (West Supp. 1996); see *id.* § 1-1-104(23.6) (West Supp. 1996) (defining the term "partisan election" to mean "an election in which the names of the candidates are printed on the ballot along with their affiliations"). All elections for federal office conducted in Colorado are "partisan elections." *Id.* § 1-4-502(1) (1973 & West Supp. 1996). The term "political party" is defined to mean "any political organization whose candidate at the last preceding gubernatorial election received at least ten percent of the total gubernatorial vote cast." *Id.* § 1-1-104(25) (West Supp. 1996). Colorado law also es-

But nothing in the Constitution mandates that approach. Consistent with the Constitution, the States might choose instead to make ballot access contingent for all candidates on the submission of a particular number of signatures. The States might also decide that candidates should be listed on the ballot by name alone, without reference to party or other group affiliation. Under such a system, individuals would retain their First Amendment right to associate for the purpose of endorsing and supporting particular candidates or slates of candidates. But the identification of the candidate with the association on the ballot itself—the feature that (under the FECA) distinguishes political parties from other advocacy groups—is the product of state discretion rather than constitutional command.

Neither logic nor precedent suggests that a State's decision to give an organization official recognition on the ballot expands the organization's First Amendment rights by eliminating Congress's authority to impose coordinated spending limits that are validly applied to non-party political committees.[21] To the contrary, when a political party assumes an official role in the State's electoral machinery, it is typically subject to *greater* constraints than a political organization acting in a purely private capacity. This Court has held that "when a State prescribes an election process that gives a special role to political parties," the parties'

tablishes a petition procedure for placing on the ballot the names of "[c]andidates for partisan public offices * * * who do not wish to affiliate with a political party," *id.* § 1-4-802(1) (West Supp. 1996), and provides for write-in voting as well, see *id.* § 1-4-1101 (West Supp. 1996).

[21] Of course, respondent could in theory propose a definition of "political party" other than that contained in the FECA, and could contend that political parties (so defined) are constitutionally entitled to an exemption from the coordinated expenditure limits that apply to other donors. But neither respondent nor the courts below have suggested an alternative method of distinguishing a "party" from a non-party political committee.

conduct may for certain purposes be attributed to the State itself, thereby subjecting the parties to constitutional requirements that would not apply to wholly private actors. *California Democratic Party*, 120 S. Ct. at 2407. More generally, the "States have a major role to play in structuring and monitoring the election process, including primaries," *id.* at 2406, and in performing that responsibility the State has significant latitude to regulate the political parties' internal decisionmaking processes. The Court has "considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Id.* at 2407 (quoting *American Party of Tex.* v. *White*, 415 U.S. 767, 781 (1974)).[22]

Notwithstanding their involvement with the State's electoral machinery, political parties retain a significant private character, and a corresponding right to invoke the guarantees of the Constitution. This Court has squarely rejected "the proposition that party affairs are public affairs, free of First Amendment protections." *California Democratic Party*, 120 S. Ct. at 2407. As we emphasize above, however, the FECA restrictions at issue in this case do not impose special restrictions on a party's efforts to support its nominees, but instead permit party-coordinated expenditures in amounts substantially greater than the limits that apply to

[22] In considering constitutional challenges to state ballot-access restrictions, the Court has similarly recognized that the States have significant (though not unlimited) discretion to impose reasonable limits in order to prevent voter confusion and preserve the stability of its political system. See, *e.g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 357-370 (1997); *Norman* v. *Reed*, 502 U.S. 279, 288-296 (1992); *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193-199 (1986); *Anderson* v. *Celebrezze*, 460 U.S. 780, 786-806 (1983); *Storer* v. *Brown*, 415 U.S. 724, 728-746 (1974); *Jenness* v. *Fortson*, 403 U.S. 431, 434-442 (1971); *Williams* v. *Rhodes*, 393 U.S. 23, 30-35 (1968).

other donors. Respondent claims not merely a First Amendment right to engage in political association and advocacy, but a First Amendment right to a complete exemption from the campaign spending limits that apply (and that have been upheld by this Court as applied) to other would-be donors. Because the quasi-official status of political parties has traditionally been regarded as a justification for *increased* regulation of their affairs (in comparison to those of other advocacy groups), respondent's theory is unsupported by this Court's precedents.

State regulation of the party nominating process, like the FECA limits on party coordinated expenditures, has historically served to reduce the power of the party hierarchy and to promote candidate responsiveness to a broader constituency. "The Progressive Era laws that shifted control over nominations from party committees and conventions to primaries constituted an effort to reduce the influence of party organizations over party candidates, presumably reflecting the notion that candidates (and elected officials) would embrace different positions on issues of public importance if they were less beholden to party officials." Richard Briffault, *Campaign Finance, the Parties, and the Court*, 14 Counts. Comm. 91, 117 (1997). If the First Amendment permits the States to pursue that objective by imposing rules on party governance that have no counterpart with respect to other political associations, Congress can surely subject the parties to spending limits that are similar in kind to (and less stringent than) the caps that apply to political committees generally.

C. Legislative Judgments Regarding The Appropriate Balance Between The Maintenance Of A Vigorous Party System And The Prevention Of Corruption Are Entitled To Substantial Deference

As the dissenting judge in the court of appeals observed, "determining which measures suitably balance the nurture of political parties and the prevention of their use as tools of corruption is a matter for the legislative rather than the judicial process." Pet. App. 39a (Seymour, C.J., dissenting); see also *id.* at 50a ("*As a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics.*"); *Shrink Mo.*, 120 S. Ct. at 912 (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments."); cf. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (Congress's "careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference").

By vesting political parties with a preferred constitutional status, respondent would disable Congress and the States from imposing limits on the parties' campaign spending.[21]

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[21] In *Missouri Republican Party* v. *Lamb*, 227 F.3d 1070 (8th Cir. 2000), a divided panel of the Eighth Circuit recently held that a state-law limitation on cash and in-kind contributions by political parties to candidates violates the party's First Amendment rights. The court rejected Missouri's contention that the contribution limit serves to prevent actual or apparent political corruption, stating that "it is not easy to see how a party could 'corrupt' one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles." *Id.* at 1073. The court relied in part on the Tenth Circuit's decision in the instant case. See *id.* at 1072, 1073. The dissenting

Although this Court has recognized the substantial public and governmental interest in the effective functioning of our current two-party system, see, *e.g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 366-367 (1997); *Davis* v. *Bandemer*, 478 U.S. 109, 144-145 (1986) (O'Connor, J., concurring), federal and state legislatures have traditionally enjoyed significant latitude to determine how that interest is best effectuated and how it is appropriately balanced against competing objectives. Acceptance of respondent's constitutional argument, by contrast, would sharply restrict legislative authority to define and limit the appropriate role of the parties vis-à-vis other participants in the political fray.[24]

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judge would have upheld the law on the ground that "contributions made by a political party are no different than contributions made by individuals or other groups." *Id.* at 1077 (John R. Gibson, J., concurring and dissenting). He concluded that "[b]ecause Missouri's limits on cash contributions that a party may make to a candidate are closely drawn to meet a sufficiently important governmental interest, they do not violate the First Amendment." *Ibid.*

[24] One commentator explains:

> In essence, the question of whether party committee coordinated spending raises a danger of parties corrupting candidates is really a question of how much or how little potential for influence parties ought to be allowed to have over their candidates' campaigns—and whether Congress or the Court should decide this. Certainly, elected officials seem to be in a much better position to consider and combine the multiple and often conflicting values of candidate autonomy, party responsibility, voter participation, and the potential for parties to serve as conduits for special interest influence. Elected officials are more likely to understand the impact of the campaign finance laws on the political process and the interaction of party spending with other campaign finance laws and governance generally.

Briffault, *Campaign Finance, the Parties, and the Court*, 14 Const. Comm. at 118-119. Professor Briffault notes that "there is no reason to believe that elected officials are likely to be hostile to party interests," since "[t]he vast majority of elected federal and state officials are elected on party lines and nearly all carry major party labels." *Id.* at 119. He

With respect to federal elections, Congress has specifically addressed the subject of campaign spending by political parties and has attempted to draw an appropriate balance between competing objectives. See 2 U.S.C. 441a(d). Recognizing the distinctive role that political parties have come to play in our system of government, Congress has authorized party committees to make coordinated expenditures in amounts much greater than the limits that apply to other donors. Congress has declined, however, to leave party campaign spending wholly unconstrained. Because an Act of Congress comes to this Court with a presumption of constitutionality; because the Court has already upheld against First Amendment challenge the more stringent coordinated spending limits applicable to non-party organizations; and because Members of Congress are neither ignorant of the practical needs of political parties nor hostile to their interests, that legislative judgment should be sustained.

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acknowledges the existence of "considerable scholarly support for a party-centered campaign finance system as a step toward creating a more 'responsible' two-party system, with attendant benefits for government performance and responsiveness." *Id.* at 118. He concludes, however, that "[a] party-centered system might very well be a good idea. But it would be a major departure from past and present practice. And it is hard to believe that the decision whether to have a party-centered or candidate-centered system is a question of constitutional law, to be decided by the Supreme Court, rather than a preeminently political question to be decided by Congress." *Id.* at 120.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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OPINIONS AND ORDERS BELOW

The May 5, 2000, opinion of the United States Court of Appeals for the Tenth Circuit is reported at 213 F.3d 1221 and is reproduced at Pet. App. 1a-53a. It affirmed the February 18, 1999 order and memorandum decision of the United States District Court for the District of Colorado, reported at 41 F. Supp. 2d 1197 and reproduced at Pet. App. 54a-91a that, on remand, declared unconstitutional the limits imposed upon coordinated party spending by 2 U.S.C. § 441a(d)(3).

The June 26, 1996 opinion of this Court, referred to herein as *Colorado I*, is reported at 518 U.S. 604 and is reproduced at Pet. App. 92a-142a. *Colorado I*, which held that political parties freely may engage in independent speech, also vacated the first opinion of the Court of Appeals in this matter, which is reported at 59 F.3d 1015 (Pet. App. 143a-162a), and remanded for further development the issue of the constitutionality of limits on coordinated party spending.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, the Party Expenditure Provision of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. § 441a(d), as well as other relevant parts of FECA, appear in the Brief for Petitioner ("FEC Brief") at 2-3.[1] A further provision of FECA, not found in the FEC Brief, is the "Anti-Earmarking Provision," § 441a(a)(8), which states that:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including

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[1] Section references within this brief are to Title 2 of the United States Code unless otherwise noted.

contributions which are in any way earmarked through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

STATEMENT OF THE CASE

Preliminary Statement

The Colorado Republican Federal Campaign Committee ("Colorado Party") would face serious criminal penalties if, in cooperation or consultation with its own candidate for Congress, it were to pay for a single letter to each eligible Colorado voter, or even to each registered Colorado Republican, explaining how electing that candidate would advance the Party's platform and values. The Party Expenditure Provision limits at issue in this case, § 441a(d)(3), forbid a party to spend more than 7 cents per voter in cooperation or consultation with, or at the request of, its own candidate for Senate or the House of Representatives.[2] Since postage alone is 34 cents per first class letter, and postage is but a fraction of the cost of a mailing, even a single coordinated letter to each voter is a crime.

[2] The 2000 Senate Limits appear in the FEC *Record* (Vol. 26, No. 3, March 2000), at 15, available at <www.fec.gov>. The limit varies widely, from a low of $67,560 for Delaware, Hawaii, Idaho, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont to $1,636,438 for California, $929,355 for New York, and $967,797 for Texas. Colorado's 2000 Senate limit was $202,072. The House limit is $33,780 in most states, but is double that ($67,560) in states with only one representative, i.e., Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. These limits apply separately to state and national party committees. A state committee may assign its limit to the national committee, or vice versa. *See, FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

These stringent limits on a party's coordinated political speech apply even though the Party may spend only "hard money" to fund coordinated speech. Hard money consists of voluntary contributions that a party receives in limited amounts (typically under $100) from individuals and political committees (not corporations and labor unions), and that are fully reported and publicly disclosed pursuant to FECA. Disclosures are accessible online at <www.fec.gov> and <www.tray.com>. So-called "soft money" is not regulated as to amount and source, but it cannot be used for coordinated speech and is not at issue here.[3]

The Colorado Party grounds its First Amendment challenge to the Party Expenditure Provision on three propositions. First, requiring a political party to sever its natural, strong, pre-existing ties to its candidate as the price of unrestricted political speech directly, substantially, and uniquely burdens the party's core First Amendment rights. Second, assuming arguendo that a sufficiently compelling showing might sustain such a burden, the FEC has not made such a showing—despite having many years to do so. Third, even if a sufficient interest were shown, FECA's limits on coordinated party speech are not closely drawn to the interests asserted.

For these reasons, the Colorado Party contends, and the Tenth Circuit and the district court agree, that FECA's stringent categorical limit on coordinated party speech cannot stand.

This Court's Earlier Ruling And Remand

In *Colorado I* this Court held that the First Amendment invalidated FECA's restrictions on a political party's use of hard money to fund its independent speech on behalf of its candidates. Four Justices also were prepared to hold

[3] "Soft money" is not a term of art. In this brief, it describes funds that are not subject to FECA prohibitions or dollar limits and are received by national party committees. Nonfederal state party receipts, however, are regulated by applicable state law.

immediately that FECA's restrictions on coordinated speech are invalid. (Pet. App. 114a, 119a). The controlling plurality, however, preferred to remand the issue of coordinated spending restrictions for further factual and legal development. (Pet. App. 113a).

On remand the district court allowed the FEC a further year and a half of discovery to supplement the four years of discovery previously allowed. Thus, the FEC had a total of five and one-half years of discovery to develop evidence to justify the Party Expenditure Provision limits.

The FEC's discovery effort was extensive and exhaustive. It included interviews with many persons involved in the political process, preparation of their declarations, submission of expert reports, and depositions of political party leaders and experts. The FEC also subpoenaed documents from many third parties.

FECA's Party Expenditure Provision

FECA acknowledges that the relationship between political parties and their candidates is unique. It defines "political party" as an association that "nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association . . ." § 431(16).[4] Moreover, subsection (1) of the Party Expenditure Provision "exempt[s] political parties from the general contribution and expenditure limitations," *Colorado I*, Pet. App. 96a, stating that a party may make expenditures "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions." § 441a(d)(1). There is no dispute that the term

[4] FECA also defines "national committee" and "state committee" of political parties. §§ 431(14), (15). Such party committees are distinct from political action committees (PACs), which FECA refers to as "separate segregated funds." *See* § 431(4)(B).

"expenditures" in this provision includes expenditures that a party coordinates with its congressional candidates.[5]

The Party Expenditure Provision sets limits on party expenditures, including coordinated expenditures, that, adjusted for inflation, allow only about 7 cents per voter, as is discussed above. *See* § 441a(d)(3).[6] In setting these limits, Congress balanced its purpose of "reducing what it saw as wasteful and excessive campaign spending" against its goal of maintaining "an important and legitimate role for political parties." *Colorado I*, Pet. App. 104a. FECA's legislative history does not reflect any concern by Congress that party spending might be corruptive.

The Factual Record

Most of the materials developed during the extensive discovery process, including depositions of numerous officials of both major parties, were placed into the summary judgment record. In this Court, however, the FEC largely abandons the evidentiary record that it compiled. Instead, the FEC Brief relies on speculation (*e.g.*, at 23, "It is reasonable to assume . . .") and citation to publications (*e.g.*, at 36, 38, 46, 48, and 49) that were not subjected to the rigors of

[5] Until *Colorado I* the FEC took the position that all expenditures by a party in connection with an election were coordinated. Thus, the Party Expenditure Provision was understood to regulate all party spending. *Colorado I* held that parties are capable of making independent expenditures, but it simultaneously held that FECA cannot restrict such expenditures.

[6] The Party Expenditure Provision limits were established in 1974. The limits on House races are $10,000 adjusted annually by the Consumer Price Index ("CPI"). § 441a(c)(1). Limits on party spending in Senate races and states with a single congressional district are based on the voting age population or $20,000 and are also adjusted annually for population and CPI. § 441a(d)(3)(A). The Senate limits are discussed further *supra* at 2 n.2. These limits "substitute" for the limits from which parties are "exempted" by § 441a(d)(1). *Colorado I* at 96a.

discovery and adjudication. The FEC fails to cite its own experts, perhaps because their testimony supports the position of the Colorado party. Pet. App. 83a (district court opinion, *citing* Sorauf/Krasno Report). The FEC Brief adds nothing material to what the Court knew at the time of *Colorado I*.

The Colorado Party deposed two of the FEC's affiants, both former United States Senators. These Senators testified that they had never been subjected to corruption or untoward influence by the party with which they chose to associate.[7] The Party also introduced into evidence the expert reports by Professors Anthony Corrado and Herbert E. Alexander which are reproduced at JA 106-157 and 170-243. The FEC deposed the authors of those reports at length. It has never asserted that these depositions undermined the reports.

Once discovery was concluded, the Colorado Party moved for summary judgment accompanied by a comprehensive statement of undisputed facts to which the FEC was obliged to respond with specificity, identifying any basis for disagreement. The FEC's response appears at JA 26-89. The Colorado Party's submissions, and the FEC's responses were relied upon by the courts below, and offer detailed insight into the unique relationship between political parties and their candidates.

The district court opinion reviews the record in detail and sets out the undisputed facts (Pet. App. 54a-91a). The FEC

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[7] When asked if party support had corrupted him, Senator Paul Simon replied, "I have never promised anyone anything." (JA 282). Similarly, Senator Tim Wirth had no example of ever having been corrupted. Neither Senator identified any other member of Congress who had been corrupted by his or her party. Similarly, none of the *Amici* members of the House and Senate assert that they have been corrupted by their respective political parties, let alone that they were corrupted by coordinated party expenditures. This lack of corruption is noteworthy since each of the Amici Senators benefitted from party coordinated expenditures. *See infra* at 12 n.10.

Brief makes no attempt to take issue with the district court's careful factual analysis or to grapple with the evidentiary record that the FEC insisted be compiled. Summarized below are some of the key undisputed facts.

The Unique Relationship Between Political Parties And Their Candidates

Political parties are voluntary associations formed to support candidates and promote policies. (JA 31-33, at ¶¶ 5-6). Parties are unique in their close relationship with and dependence on their candidates. (JA 32-33, 48, at ¶¶ 8, 28). Parties recruit and promote their candidates, work with their candidates to define party messages for the voters, and through their candidates seek to win elections in order to govern. (JA 34-39, at ¶¶ 11-12, 14, 16). Voters know parties by their candidates, and know candidates by their party affiliations. (JA 32-36, 58-59, at ¶¶ 8, 12, 44-45). Without their candidates, parties would be just another political interest group. (JA 54-55, 58-61, at ¶¶ 38, 44-45, 48).

The unique role of the modern political party in our democracy is widely recognized. (JA 30-36, at ¶¶ 4-13). Election laws accommodate party needs for primaries or other devices to nominate the party candidates. (JA 33-35, at ¶¶ 9-11). Typically name and party affiliation are the only ways a candidate is identified on the ballot. (JA 59, ¶ 45). Consistent with all of this, FECA identifies political parties by their unique role in nominating candidates who appear on the ballot as the candidate of the nominating group. § 431(16). Moreover, subpart (1) of the Party Expenditure Provision confirms the unique character of parties, exempting their expenditures from FECA's general limits. *Colorado I*, Pet. App. 96a.

The relationship between a political party and its candidates is so close that, until *Colorado I*, the FEC viewed parties as incapable of engaging in campaign speech

independent from their candidates. (JA 48-49, at ¶ 29). Forcing a party to engage in campaign speech independent of its candidate is an "unnatural act." (JA 48-52, at ¶¶ 28-32). The FEC's own experts acknowledged this "unique" relationship and the strain caused by separating party from candidate. (JA 50-51, at ¶ 31).

Following *Colorado I*, some political parties attempted the separation necessary to permit independent expenditures. (JA 51-52, at ¶ 32). They found that such an effort entails duplication, inefficiency, and expense. *Id.* Moreover, the resulting inability to coordinate the party's message with that of its candidate impairs effective communication and results in public confusion. (JA 55-56, at ¶ 39). The FEC's own experts concede that coordinated speech is far more effective and attractive to parties than independent speech. (C.A. App. 511-13). They also concede that political parties would engage in much more coordinated speech if they were not inhibited by FECA. (C.A. App. 511).

The Operation Of Political Parties

Political parties establish national and state level committees to act for the parties with respect to federal campaigns. § 431(14), (15). The Republican and Democratic national parties each have national, senatorial, and congressional campaign committees. Pet. App. 59a n.19. Similarly, the Republican and Democratic parties in each state maintain federal campaign committees. (JA 32-33, ¶ 8). These party committees are distinct from the campaign committees of the individual candidates, though cooperation is common. (JA 48, ¶ 28). Plaintiff/respondent here is the federal campaign committee of the Colorado State Republican Party. (JA 29-30, ¶ 3).

In contrast to days past, modern political parties operate in a fish bowl. To comply with FECA, the federal committees of political parties typically maintain segregated federal (*i.e.*, "hard money") accounts. 11 C.F.R. § 102.5. The restrictions

imposed on the receipt and use of hard money are detailed below at 14-17.

Political party committees also maintain state accounts subject to state regulation. For instance, in Colorado no person can contribute more than $25,000 to the Colorado Republican Party per year. Colo. Rev. Stat. § 1-45-105.3(2)(a). Thus, unlimited "soft money" contributions are not permitted in Colorado. Colorado also requires disclosure of all contributions, and the party's reports are available online at <www.sos.state.co.us/pubs/election/main.htm>.[8]

Party disclosures are closely scrutinized by opposing parties and candidates, public interest groups, and the media. Political parties are accountable to the public. The hint of scandal has immediate adverse repercussions, both for contributions and at the ballot box. *See* (JA 39-40, 61, at ¶¶ 17, 48).

Political parties engage in political speech. State and national committees of a party work together to assist party candidates and to communicate the party message to voters. "Party committees offer candidates a wide range of election-related services, including organizational consulting, issue research, polling, mail services, and media production and advertising assistance." (JA 207). Some national committees "have state-of-the-art television and radio production facilities on their premises, which are used to give candidates technical

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[8] The Brief of State Attorneys General *Amicus Curiae* notes that political parties are subjected to a variety of regulations under state law. *See* Brief *Amicus Curiae* of the States of Missouri, Colorado, Hawaii, Montana, New York, Oklahoma and Vermont In Support of Petitioner at 2 n.1. The constitutionality of these restrictions is not at issue here. According to the Attorneys General, at one time 20 states limited party support of candidates but today only 17 do so, with 33 now imposing no such limit. Thus, the trend is to eliminate such limits, and the substantial majority position among states disfavors such limits.

and editorial assistance in producing television and radio ads." (JA 209). With respect to coordinated party expenditures, *"[o]ver 90 percent of the monies spent by national party committees on behalf of their candidates is spent on political communication."* (JA 210-11) (emphasis added).[9] All coordinated campaign speech paid for by a party is required to disclose the party's sponsorship both by FECA, § 441d, and by federal communications law, 47 U.S.C. § 317.

Party committees may make only limited cash contributions directly to a candidate or campaign. A state party such as the Colorado Republican Party may contribute only $5,000 per candidate per election. § 441a(a)(2). Certain national party committees, in combination, may also contribute up to $17,500 to any candidate for the United States Senate per six-year election cycle. § 441a(h). Expenditures made and controlled by a party committee, however, are *not* subject to these contribution limits. As the FEC repeatedly reemphasizes, *"coordinated party expenditures . . . are not contributions."* *See, e.g.*, 62 Fed. Reg. 50,708, 50,712 (1997); FEC Press Release of March 1, 2000 at <www.fec.gov>. As the FEC complaint in this case illustrates, the FEC treats excessive coordinated expenditures as violative of the Party Expenditure Provision, not of the contribution limit of § 441a(a)(2).

The FEC's experts explain that political parties generally do not allocate support to candidates in return for policy positions; instead, their objective is "to win or maintain control of the chamber and the powers of the majority

[9] The FEC's Reply Brief for Petitioner concerning certiorari stated (at 4-5 n.5) that the FEC was "unaware of any record material(s) that would support the 90% figure." The 90% figure appears in the expert report of Professor Anthony Corrado (JA 210), and was *admitted* by the FEC in the district court (JA 57, ¶ 42).

legislative party." (C.A. App. 483). Thus, parties allocate their support "for electoral reasons—a chance to win a seat, the danger of losing a seat," rather than to coerce particular decisions. (C.A. App. 485). Several of the *Amici* political scientists confirm this. *See infra* at 27 n.17. Discovery did not identify any instance in which a political party changed a candidate's vote by offering or withholding campaign support.

"One of the major problems in the campaign finance system is the inability of challengers [as opposed to incumbent candidates] to raise the monies needed to wage viable campaigns." (JA 204). "Party money is the only major source of funds in the political system that challengers can rely on to help counter the overwhelming resource advantage incumbents enjoy as a result of their greater success in fundraising [and] the privileges that accompany their position in government, such as the franking privilege." (JA 205). The statements of the FEC and Colorado Party experts are confirmed by the following statistics, which the FEC admitted (JA 76-77):

> In both parties in 1996, the majority of party coordinated expenditures were made on behalf of non-incumbents. The Democrats devoted 85 percent of their total coordinated expenditures in Senate races to challengers (31 percent) and open seat candidates (54 percent). In House races, 80 percent was spent on behalf of non-incumbents, with challengers (56 percent) receiving more than twice the share that went to open seat candidates (24 percent). . . .
>
> The Republicans' coordinated activity also favored non-incumbents. Even with [an] unusually large number of threatened incumbents, the Senate and House committees each disbursed close to two-thirds of their coordinated funds on races involving non-incumbents.

(JA 201-202).[10] Party support of challengers in the 2000 election will equal or exceed the figures for the 1996 election according to preliminary figures that can be found in the FEC's own Press Release of November 2, 2000 at <www.fec.gov>. In short, political parties are "essential to the vitality of American democracy," (JA 173), as they make political races more competitive and meaningful by identifying and assisting non-incumbent candidates. (JA 75-81, at ¶¶ 74-80).

Since 1974, the Consumer Price Index ("CPI") has increased by over 328%, so that $10 in 1974 is equivalent to about $33 today.[11] However, the cost of campaigning has increased much more than the CPI. For instance, while the

[10] The history of party coordinated spending for *Amici* Senators confirms that parties tend to support non-incumbents and those incumbents who need party assistance.

For example, in his 1998 campaign, Senator John McCain received no party coordinated expenditures. He raised over $4 million and was reelected with 68% of the vote (Senator McCain had almost $2 million left over which he transferred to his 2000 campaign for the Republican presidential nomination). In 1992, however, following the so-called Keating Five scandal, Senator McCain had a more challenging race, raised only $3.3 million and was the beneficiary of $302,528 in party coordinated spending, which equaled almost 10% of his funding. Similarly, Senators Max Cleland and Russell Feingold in their first campaigns as challengers against incumbent Senators in 1996 and 1992 received party coordinated support which equaled 22.3% and 19.1% of their total campaign receipts or $638,939 and $353,210, respectively. In 1998, coordinated expenditures declined to 2.9% of Senator Feingold's funding. Freshman Senator Charles Schumer who also beat an incumbent in 1998, has the distinction among *Amici* of receiving the highest amount of party support ($2.5 million) from three political parties (Democratic, Liberal, and Independence Parties), which accounted for over 15% of his funding. Data for all *Amici* Senators is contained in Addendum A to this Brief.

[11] *See supra* at 2 n.2, showing the FEC's inflation calculation that $20,000 in 1974 dollars equal $67,560 in year 2000 dollars.

CPI rose about 40 percent between 1976 and 1980, the cost of "such basic items as mass media, television commercials, and air travel, grew by 50, 100, and 300 percent." (JA 194). These campaign costs have continued to escalate much faster than the rate of inflation. *Id.*

FECA's limits on coordinated party expenditures prevented parties during 1996 from employing "significant amount of media broadcast time" to engage in effective communication:

> Generally the § 441a(d) limits prevent the parties from purchasing the broadcast time needed to air more than one or two ads effectively on a statewide basis. For example, in 1996, the national party organizations were permitted to spend $168,707 in South Carolina under the § 441a(d) ceiling. The estimated cost to air *one* thirty-second campaign ad in South Carolina on a statewide basis with enough frequency that it would penetrate the viewing audience and have its message understood by voters was approximately $186,000.

(JA 214.) The comparable 1996 costs in Colorado for one 30-second ad for a Senate candidate was "$123,750 against a limit of $170,932." *Id.* In short, party spending limits "make it impossible for [party] committees to pay for a very extensive or intensive amount of campaign speech." *Id.* Indeed, "[a]t this level of funding, party committees could not afford to pay the postage on one letter to each eligible voter in a district or state, never mind the cost of the stationary and printing needed to produce the letter." (JA 193).

The Sources Of Party Committee Funding: Hard Money And Soft Money

Hard Money

Party committees obtain their funding exclusively from voluntary contributions (JA 39-40, at ¶ 17) and transfers of excess hard money funds from their own federal candidates. Hard money—the only money that parties can spend in

connection with federal elections—may come only from individuals or political action committees ("PACs"), or from federal candidate committees. § 441a(a) and § 439a. Contributions from corporations or unions are prohibited. § 441b. For both Republican and Democratic party committees, the majority of hard money comes in increments of less than $100. (JA 44-45, at ¶¶ 23-24), Pet. App. 63A-64a (district court opinion).[12] As the FEC *admitted* below, "hard money contributions overwhelmingly result from direct mail solicitations." (JA 45, at ¶ 24).

Limits On Individuals

- Individuals may contribute only $5,000 to a political party per calendar year for use in connection with the party's federal activities, including the making of coordinated expenditures. § 441a(a)(1)(C).
- Individuals may contribute only $1,000 per election to a candidate for federal office. § 441a(a)(1)(A).
- Individuals may contribute up to $20,000 per calendar year to a national political party committee. § 441a(a)(1)(B).
- Individuals also are subject to a $25,000 per calendar year limit on contributions to the federal accounts of *all* candidates and political committees, including PACs. § 441a(a)(3). If the full $25,000 is contributed to committees, then nothing may be given to individual campaigns, and vice versa. § 441a(a)(3).

[12] The Brief of *Amicus Curiae* National Voting Rights Institute (at 2-3) suggests, without confirmable citation, that the average hard money contributions in the 2000 election cycle was over $200. This figure encompasses contributions to candidates, including presidential candidates, who raised record amounts of $1,000 contributions this election. It is not the average for hard money contributions to political parties. The record shows that the majority of hard money contributions to political parties are under $100.

- Once a contributor reaches a limit, FECA forbids the contributor from "earmarking" any additional contributions to a candidate through any other source, including a political party. § 441a(a)(8). Contributions to a party that "are in any way earmarked or otherwise directed" to a candidate or campaign must be reported by the party and count against the individual's $1,000 limit. § 441a(a)(8).

Limits On Corporations And Labor Unions

- Corporations and labor unions are prohibited from making *any* contributions in connection with any federal election. § 441b. They may establish PACs for their personnel but may not themselves contribute to the PACs. § 441b(b)(2)(C).

Limits On PACs

- Like individuals, political action committees, which must register with the FEC pursuant to § 433, may contribute no more than $5,000 per calendar year to a party committee. § 441a(a)(2)(C).
- Multicandidate political action committees ("PACs") may contribute $5,000 per candidate per election. § 441a(a)(2)(A). Otherwise, political action committees are also subject to the $1,000 per candidate per election limit found in § 441a(a)(1)(A).
- PACs may contribute $15,000 to the national political party committees. § 441a(a)(2)(B).
- PACs are also subject to the restrictions on earmarking found in § 441a(a)(8).
- All individual and PAC contributions discussed above must be fully reported by the recipient committees pursuant to § 434.

Transfers From Candidates

- Federal candidate committees are permitted to transfer unlimited amounts of their own excess hard money funds to political party committees. § 439a.

• In the 2000 election cycle, Democratic *candidates* donated $7.7 million to the Democratic party committees, more than these party committees spent on coordinated expenditures. *See* Jonathan D. Salant, *More House Races Exceed $1 Million To Run Campaigns*, The Detroit News, Dec. 27, 2000, at 13, *available at* 2000 WL 30260249. In addition, Republican *candidates* donated $18 million in excess campaign funds *to* the national party committees. Again, more than the amount spent on coordinated expenditures. *Id.* These candidate donations are in addition to the type of candidate fundraising for parties discussed in the FEC Brief (at 31-32 n.14).

Enforcement and Sanctions

• A knowing and willful violation of FECA involving over $2,000 is a crime punishable by up to one year's imprisonment and a fine of up to $25,000 or 300 percent of any involved contribution or expenditure. § 437g(d).

• In a civil enforcement action, the court may impose an injunction and a civil penalty equal to the greater of any contribution or expenditure involved or $5,000. § 437g(a)(6)(B). If the violation is knowing and willful, the potential civil penalties double. § 437g(a)(6)(C).

Soft Money

Present FEC regulations allow national party committees to receive soft money contributions in unlimited amounts from any source, including corporations and unions. *See* 11 C.F.R. Parts 102, 103, and 106.[13] States, including Colorado, restrict

[13] The most recent FEC statistics show that 53% of all national Democratic Party receipts, and 42% of Republican receipts, is soft money. FEC Press Release, November 3, 2000. Moreover, the FEC data reflects that soft money revenues are increasing at triple digit rates (247% from 1992-96 and 100% from 1996-2000) while hard money revenues from 1996 to 2000 are almost flat. *See* Anthony Corrado, *Introduction to*

soft money receipts and use. *See, e.g.*, Colo. Rev. Stat. § 1-45-105.3(2)(a); Conn. Gen. Stat. § 9-333s(b), t(b). *Soft money cannot be spent in connection with federal elections or for coordinated expenditures*, Pet. App. at 23, but is instead used to assist candidates running for state office, *see* § 431(8)(A)(i) (limiting FECA to contributions in connection with a federal election), for voter registration and "get out the vote" drives, *see* § 431(8)(B)(xii), or for "issue ads." 11 C.F.R. § 106.5(a)(2)(iv).[14]

The FEC is conducting a rulemaking to determine whether soft money should be curtailed or eliminated. 63 Fed. Reg. 37,722 (1998). Nothing in FECA affirmatively authorizes parties to receive soft money. The FEC's general counsel has advised the agency that it has the power to eliminate soft money if it so chooses. *Id.* Also, bills were introduced in the last Congress to "ban" soft money.[15]

The Effectiveness Of Current FECA Limits

The record is entirely barren of evidence that FECA's limits on contributions are ineffective or readily are subject to circumvention. There is no showing that contributions are not accurately reported or that excessive contributions are not detected and remedied. Declarations obtained by the FEC

Chapter 6: Party Soft Money in Campaign Finance Reform: A Sourcebook, 165, 167-177 (Anthony Corrado, et al., eds. 1997); FEC Press Release dated June 23, 2000 *available at* <www.fec.gov>.

[14] The plurality in *Colorado I* noted that soft money may be used for certain party building activities but, in general, "may not be used to influence a federal election." Pet. App. 102a. More precisely, soft money may not be used to finance coordinated activity or for purposes of "express advocacy," which means speech that uses explicit language to advocate electoral action (e.g., "vote for" or "defeat"). *Buckley*, 424 U.S. at 44 & n.52.

[15] *E.g.*, S. 1593 (McCain-Feingold); H.R. 417 (Shays-Meehan) (passed by the House on September 14, 1999); H.R. 399, H.R. 715, S. 26, S. 982).

and excerpted in its Brief (at 31-32 n.14) reveal that parties are scrupulous in obeying FECA's earmarking constraints.

Public Perception Of Campaign Finance

The FEC offered evidence that some members of the public are cynical about the election process and the role of money. In particular, FEC expert Clyde Wilcox asserted that there is a public concern about "large" contributions, giving examples of which all involved soft money.

Prof. Wilcox conceded that the general public has little understanding of FECA's requirements and restrictions, such as the restricted sources and amounts in which hard money is raised, or the fact that only hard money can be spent in connection with a federal election. (C.A. App. 529-30). Nor does the public draw any distinction between independent and coordinated party spending. *Id.*

The FEC offered no evidence that, if all independent party spending instead were coordinated, the public would either understand or care about the difference. Nor did the FEC address the possibility of educating the public as to the true role of parties in the political process. *See* Pet. App. at 89a (district court opinion).

Claimed Corruption

The FEC offered no evidence that any modern political party has corrupted any member of Congress.[16] It asserted below (FEC C.A. Br. at 51-52) four claimed instances in

[16] The FEC introduced a declaration from Senator Simon that "big donors have a "leg up" in the legislative process. (JA 270). Presumably, this was a reference to soft money donors; it certainly did not identify the party as the corrupting entity. *See* Pet. App. 16a (court of appeals opinion). Senator Simon otherwise was unable to support corruption charges. (JA 282-85). The FEC offered documents, intended to show that large soft money donors may obtain increased access to, and opportunities to persuade members of Congress. Pet. App. 85a (district court opinion.) The FEC Brief did not press this line of argument.

which a party or its leaders threatened to withhold party support to affect candidate behavior. (C.A. App. Under Seal 91-94, at ¶¶ 234, 238, 239, 240). However, in none of the instances was the party request corrupt, and in none did the candidate accede to the request. The FEC Brief largely abandons before this Court any claim of actual corruption.

SUMMARY OF ARGUMENT

Under FECA's Party Expenditure Provision, a political party is forbidden to spend more than 7 cents per voter on speech that the party coordinates with its candidate for Congress—far less than the cost of a single letter to each voter. Over 90% of the spending that is limited by the Party Expenditure Provision finances political communication. If a party wishes to engage in more speech in connection with the election, it must do so independently of its candidate. Moreover, to avoid controversy and enforcement proceedings, the separation of the party from its candidate must be clear and obvious. This Court repeatedly has held that limits on the money that may be spent on speech are limits on speech itself; that is the law of this case as established in *Colorado I*, and the FEC Brief does not challenge this settled principle.

Because a political party naturally has close and strong ties to its candidate, creating the conditions that permit unrestricted independent speech is exceptionally burdensome. Moreover, because the public perceives party speech as that of the candidate, and vice versa, differences between candidate and independent party speech create voter confusion and inhibit effective communication. The FEC does not dispute that independent party speech is much inferior to coordinated speech.

A party and its candidate are uniquely and strongly bound to one another because:

- A party recruits and nominates its candidate and is his or her first and natural source of support and guidance.

- A candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books.
- A successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns.
- A party's public image largely is defined by what its candidates say and do.
- A party's candidate is held accountable by voters for what his or her party says and does.
- A party succeeds or fails depending on whether its candidates succeed or fail.

No other political actor shares comparable ties with a candidate. FECA recognizes the uniqueness of the party/candidate relationship by (i) defining a "political party" as an entity that "nominates a candidate" who then "appears on the election ballot as the candidate of such [entity]," § 431(16), and (ii) providing that a party's spending in support of its candidates is not subject to FECA's general limits but must be addressed separately. Indeed, until *Colorado I*, the FEC conclusively presumed that all party spending in connection with a federal election was coordinated with the party's candidate, a presumption it applied to no other entity.

For these reasons, requiring a party to sever its candidate ties as the price for engaging in unrestricted political speech uniquely, directly, and substantially burdens the party's First Amendment rights of speech and association. This Court's precedents establish that any provision that directly and substantially burdens political speech triggers strict scrutiny. Accordingly, FECA's limits on coordinated party speech must fall unless the FEC shows that they are necessary and narrowly tailored to serve a compelling governmental interest in the least restrictive way, a showing the FEC Brief does not even claim to make.

Rather than attempting to satisfy strict scrutiny, the FEC mistakenly argues that FECA classifies all coordinated spending as a "contribution" and that limits on contributions are subject to a lesser standard defined in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Nixon v. Shrink Missouri Government PAC* ("*Shrink Mo.*"), 120 S. Ct. 897 (2000). Actually, the Party Expenditure Provision refers to its limits on coordinated party spending as "expenditure" limits, not contribution limits. But more fundamentally, both *Buckley* and *Shrink Mo.* set the standard of review based on an evaluation of the First Amendment effects of the particular limits at issue.

The contribution limits at issue in *Buckley* and *Shrink Mo.* applied to individuals or PACs, which typically do not have a political party's strong natural ties to a candidate. *Buckley* and *Shrink Mo.* found that, for individuals and PACs, coordination with a candidate was just one of many freely available avenues of political expression, and that individuals and PACs thus experienced only "marginal" and "limited" First Amendment burden from the limits at issue. 424 U.S. at 20-21; 120 S. Ct. at 903. That finding—not a "contribution" label—was the predicate for a lesser standard of review.

By contrast, party/candidate coordination is not just one of many equally available options for a party. Instead, a party's natural state is to be closely tied to its candidate, and these natural ties are exceedingly burdensome and difficult for a party to sever.

Limits on party coordination are best compared to limits that the original FECA imposed on a candidate's use of personal resources in coordination with his or her own campaign committee. Although the *Buckley* Court of Appeals found those limits comparable to contribution limits and sustained them, this Court applied strict scrutiny and struck them down. 424 U.S. at 53. *Buckley* did this even though a candidate's wealth may stem from narrow economic interests,

while a party's hard money comes entirely from a broad base of voluntary donations.

Because limits on party coordination directly and substantially burden party speech, the rationale of *Buckley* and *Shrink Mo.* calls for traditional strict scrutiny here. But even if the lesser standard described in *Shrink Mo.* applies here, the FEC still would have to show that FECA's limits on coordinated party spending are "closely drawn" to serve a "sufficiently important interest," 120 S. Ct. at 899. The Court of Appeals correctly held that the FEC did not meet either aspect of that lesser standard.

Throughout most of this litigation, the FEC asserted that FECA's limits on coordinated party speech prevent actual or perceived corruption. Yet, despite years of discovery – four years before *Colorado I* and a year and a half on remand – the FEC anticorruption rationale is without support. Tacitly conceding this, the FEC Brief asserts (at 23) that Congress could "*assume*" that limiting coordinated party spending prevents corruption.

In fact, Congress made no such assumption—much less a legislative finding—and it did not view parties as corruptive. Congress had a positive view of parties; it limited coordinated party spending as part of an effort to reduce overall campaign spending levels. *Colorado I*, Pet. App. 108a. The isolated fragments of a 1973 floor debate cited by the FEC Brief concern an unenacted bill and hinge on features that are not present in FECA.

Nor is the FEC's proposed assumption plausible. To begin with *FECA requires a party to use hard money for coordinated spending*. Hard money is raised in limited amounts from individuals and PACs and is fully reported and publicly disclosed. Scholars agree that a party's hard money is the cleanest available to candidates. Present law also permits parties to receive soft money in unlimited amounts

from corporations, unions, and other sources. *But soft money cannot be used for coordinated spending*. Any concerns over large contributions can be addressed directly, *Colorado I*, Pet. App. at 102a, as the FEC presently is considering in a pending soft money rulemaking. 63 Fed. Reg. 37,722 (1998), and Congress in proposed legislation.

Moreover, a political party's overriding objective is to elect its candidates and attain majority status so it can govern. While a party also has a platform and shared policy objectives, parties focus their campaign support on races that are in doubt, and on non-incumbent candidates who lack the independent sources of funding that incumbents soon develop. The FEC offered largely hearsay reports of four alleged instances in which an attempt was made to use party campaign support to affect candidate conduct: no attempt succeeded, and none involved a corrupt goal.

The scenario of candidate office-holder as party victim is untenable. A party's members of Congress form a strong party leadership group. Because they have independent financial support, they usually do not need or receive party coordinated spending. Indeed, they are net party contributors, and are most unlikely to be pushed around by their party, or by individual party leaders.

As post-remand discovery failed to support an anti-corruption justification, the FEC shifted to a theory that limiting party coordination prevents circumvention of FECA's limits on individuals and PACs. There is no indication that Congress adopted the party limits for that reason, however, and FECA otherwise effectively prevents circumvention.

FECA backs up limits on individual and PAC contributions to particular candidates with limits on their contributions to parties and with aggregate annual limits. It establishes comprehensive reporting and disclosure requirements,

assuring that a vigilant press (and vigilant opponents) may police conduct. FECA also forbids using "earmarked" contributions to intermediaries to circumvent limits, and it provides stringent penalties, including criminal penalties, for violations, which are further reinforced by the political consequences of violations.

These provisions are effective. Despite five and a half years of discovery, the FEC has no evidence that circumvention is a problem that might justify restricting coordinated party speech as a cure. The most the FEC offers is a lengthy footnote (at 31-32 n.14) discussing the "tally system" of the Democratic Senatorial Campaign Committee ("DSCC") that encourages party candidates, particularly incumbents, to solicit contributions to the party and keeps track of how much each candidate raises.

However, the FEC itself concluded that a tally system complies with FECA. Moreover, the very declarations cited by the FEC consistently emphasize that (i) tallied funds are not earmarked for the credited candidate but rather are allocated to win close races, and (ii) the one committee using a tally system has been scrupulous to comply with FECA. If problem still exists, it could be solved directly by clarifying the law.

In sum, FECA's limits on coordinated party spending serve no interest that might justify their burden on party speech. Nor are the limits closely drawn to the speculative interests the FEC proposes. Rather, FECA's limits on coordinated party spending are an anachronistic holdover from a pre-*Buckley* attempt to reduce the overall level of campaign speech, an attempt *Buckley* rejected. They needlessly interfere with party speech and other important party functions, including support of non-incumbent candidates. They diminish the value of hard money vis-à-vis soft money. They violate the First Amendment and should be struck down.

ARGUMENT

I. The Party Expenditure Provision Limits Impose A Unique, Direct, and Substantial Burden On The Party's Right Of Free Speech, And A Heavy Burden Of Justification On The FEC

There is no dispute that the Party Expenditure Provision limits party speech. "Over 90% of the monies spent by national party committees on behalf of their candidates is spent on political communication." (JA 57 at ¶ 42, 210-11). And the FEC experts admit that parties would engage in far more coordinated spending if they could (C.A App. 513). *Buckley* was clear that restricting money available for speech restricts speech itself. 424 U.S. 18. *Colorado I* adopted that principle as the law of this case in its ruling that restrictions on independent party expenditures are unconstitutional. Pet. App. 104a. FEC does not seek reconsideration of this holding.

For political parties, which naturally have close ties to their candidates, coordinated speech is not just one of many freely available avenues of expression. Instead, to avoid coordination with candidates, parties must incur significant costs and accept serious inefficiencies. This direct and substantial burden on coordinated party speech imposes on the FEC a correspondingly heavy burden of justification.

A. Parties' Strong Natural Ties To Their Candidates Make Restrictions On Coordinated Speech Uniquely And Substantially Burdensome

Buckley found that limiting coordinated spending and contributions by an individual or PAC "entails only a marginal restriction upon the contributor's ability to engage in free communication," and only a "limited effect" upon associational rights. 424 U.S. at 21, 28. It stressed that individuals and PACs have many means to express their

views and have no particular need to involve the candidate to do so. *Id.* at 20-21. In particular, nothing hinders individuals and PACs from engaging in unlimited independent speech. *Id.* To speak independently, they do not have to disentangle themselves from a candidate, but merely avoid a relationship that involves coordination. Thus, an individual or PAC experiences "little direct restraint on . . . political communication" from the limits on coordinated spending because the contributor could freely "expend such funds on direct political expression" without involving the candidate. *Id.* at 21-22.

The situation of a political party is very different, as FECA itself recognizes. Section 431(16) defines a "political party" precisely in terms of its unique candidate relationship: a political party is an entity that "nominates a candidate for election . . . whose name appears on the election ballot as the candidate of such [entity]." Moreover, the Party Expenditure Provision starts by "exempting political parties from the general contribution and expenditure limitations." *Colorado I*, Pet. App. 96a. Since FECA itself recognizes that the party/candidate relationship is unique, it would be surprising if *Buckley*'s discussion of individual and PAC support of candidates translated freely into the Party context. It does not.

For a political party, entering into a working relationship with a candidate is not just one of a range of equally available options. To the contrary, party candidates exist because parties nominate them, and from the moment a party makes a nomination a natural, strong, and unique tie is established. Indeed, because many candidates are incumbents who also serve as party leaders, the party/candidate relationship typically predates a particular nomination.

The candidate relationship, moreover, is vital to the historic purpose of political parties. Parties exist precisely to elect candidates that share the goals of their party. They seek to

build majorities that will permit the party to govern. Parties succeed only if their candidates succeed.[17]

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[17] The academics who joined in the Brief of Paul Allen Beck, *et al.* as *Amici Curiae* in Support of Petitioner, recognize the unique and statutory role of parties. "Democracy is unthinkable without parties." Paul Allen Beck & Marjorie Randon Hershey, Party Politics in America 330 (9th ed. 2001). "Most political scientists who study American politics believe that the U.S. political system is a pluralistic democracy with a few majoritarian institutions (namely, elections and political parties)." Anthony Gierzynski, Money Rules: Financing Elections in America 11-12 (2000). Accordingly, the parties are given a "unique legal status" in the government. Leon D. Epstein, Political Parties in the American Mold 156 (1986). As a result, scholars advocate expanded roles for these unique parties. "Give parties freedom to allocate the hard resources that they are able to raise among their candidates for office as they choose and not subject to existing restrictions, in order to provide a robust role for political parties . . . ." Norman J. Ornstein, Thomas E. Mann, *et. al*, *Reforming Campaign Finance* (1997), *in* Campaign Finance Reform: A Sourcebook 380 (Anthony Corrado, Thomas E. Mann *et. al* eds., 1997); "Expand the existing limits on individual contributions to parties." *Id.*

The parties are unique to these scholars because of the way they bring people together. "[P]arty committees . . . are umbrella organizations that represent a broad range of interests." Paul S. Herrnson, Congressional Elections 271 (3rd ed. 2000). *See also* Larry J. Sabato, The Party's Just Begun 5 (1988) (book cited in Daniel M. Shea, Transforming Democracy 165 (1995)) ("The parties are often accused of dividing us; on the contrary, they assist in uniting us as few other institutions do."). "Party appeals must be broad and inclusive; the party cannot afford to be exclusive or to represent only a narrow range of concerns." Beck & Hershey, *supra*, at 15.

> Political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individuals powerless against the relatively few who are individually—or organizationally—powerful.

Walter Dean Burnham, Critical Elections and the Mainsprings of American Politics 133 (1970) (quoted in Beck & Hershey, *supra*, at 330.) "In the process the parties promote political equality in elections through

the representation of those interests and by encouraging participation." Gierzynski, *supra*, at 76. "[T]he two great national parties bring a unifying, centripetal force. . . . Their similar symbols and traditions . . . are a force for unity in governmental institutions marked by decentralization and division." Frank Sorauf, Party Politics in America 15 (5th ed. 1984).

Furthermore, many of the *Amici* political scientists acknowledge that the parties, and their committees, do not force unwanted views or positions upon their candidates. "[Party leaders] believe a party should bolster its candidates' campaigns, not replace them with a campaign of its own." Herrnson, *supra*, at 15. "The party leadership has so far refrained from giving out campaign money and services on the basis of a candidate's support for the party's program." Beck & Hershey, *supra*, at 89. "The central (perhaps sole) end for [legislative campaign committees] is to reelect caucus members and secure more seats." Shea, *supra*, at 63. "Although controlled by incumbent officeholders, [congressional campaign committees] have been able to resist the pressures to serve only the reelection interests of incumbents . . . ." Beck & Hershey, *supra*, at 82. "As several [campaign] participants told us, resource allocation was . . . driven by polling numbers in competitive races." David B. Magleby, *Conclusions and Implications*, *in* Outside Money 219 (David B. Magleby ed., 2000). Indeed, the parties spread out their money and make electoral contests more competitive. "In systems in which parties are strong, money should be distributed more broadly among candidates in competitive contests." Gierzynski, *supra*, at 25. "Parties, more than individuals and PACs, are the campaign finance participants most willing to invest in challengers, ..." Magleby, *supra*, at 211. "The national parties target most of their money to candidates in close races." Paul N. Herrnson, *The Revitalization of National Party Organizations*, *in* The Parties Respond 62 (L. Sandy Maisel ed., 2nd ed. 1994). "[Party] organizations are focused almost completely on winning elections in an electoral system in which they must appeal to majorities." Beck & Hershey, *supra*, at 53. "In addition to spending disproportionately on marginal, competitive races, the parties time their spending to assure its strategic value." Frank Sorauf, Money in American Elections 141 (1988).

Indeed, rather than forcing unwanted views upon their candidates, parties are unable to speak apart from their candidates. Mann and his co-authors, in their proposed campaign finance reforms, scoff at "the subterfuge," encouraged by the *Colorado I* decision, that parties "can operate independently of their own candidates." Ornstein, Mann *et. al*, *supra*, at 380.

In important respects, the ties between a party and its candidate are beyond the party's control. The public knows parties through their candidates and candidates through their parties.

> Even before a party candidate is chosen, the public will know a great deal about the candidate because of its knowledge about the party.

Anderson v. Celebrezze, 460 U.S. 780, 822 (1983) (Rehnquist, J. dissenting). Unavoidably, a candidate's speech and conduct will be attributed to his or her party, and vice versa. And this is desirable because it creates accountability.

Following *Colorado I*, political parties tried the type of independent speech that *Buckley* found to be a freely available option for individuals and PACs. The undisputed evidence is that parties found establishing and maintaining independence to be complex, expensive, and difficult.[18] Furthermore, the party's independent speech—which the public does not distinguish from coordinated speech (C.A. App. 529-30)—often created voter confusion and even undermined the candidate the party sought to support. (JA 54-56, at ¶ ¶ 36, 39).[19] Thus, independent party speech has proved to be inefficient as well as burdensome and expensive.

The FEC does not deny that political parties find independent speech to be much less effective than coordinated speech. (C.A. App. 511-512). To the contrary,

[18] In addition to expenses caused by duplication of effort and staff and the like, the district court observed that independent party broadcast advertising is not eligible for the "lowest rates," mandated by the Federal Communications Commission. Pet. App 83a.

[19] As the ads that led to this case exemplify, see *Colorado I* at Pet. App. 97a ("advertisements attacking Congressman Wirth"), because there is less need for coordination in attacking an opposing candidate than in presenting an affirmative case to the voters, independent campaign speech tends to be negative in nature.

the FEC's experts contended that coordinated speech is so much more attractive that, if FECA's limits were lifted, parties would raise a great deal of additional hard money just to engage in such speech. (C.A. App. 513). The FEC's premise that parties do not already raise as much money as they can is questionable, but the recognition that, for a political party, independent speech is much less effective than coordinated party speech certainly is true.

Buckley itself recognizes that candidate relationships differ. The original FECA limited the ability of a candidate to support the activities of his or her authorized campaign committee from personal resources. *Buckley* held that, whether viewed as an expenditure limit or a contribution limit, this provision substantially interfered with the candidate's First Amendment rights and was invalid. 424 U.S. at 52. The relationship between a candidate and his or her campaign committee much more closely approximates the party/candidate relationship than the relationship of a candidate with an individual or PAC donor. Moreover, unlike party funding, a candidate's wealth may spring from narrow economic interests while a party's hard money comes from broad-based and limited voluntary contributions. This difference between the sources of candidate wealth and party funding suggests there is less justification for restricting parties. Yet the FEC ignores this aspect of *Buckley*.

In striking down FECA's limits on a candidate's support of his or her own campaign committee, *Buckley* did not hold that candidates have a favored constitutional status. Instead, it held that the factual characteristics of regulated classes must be taken into account in determining if a provision substantially burdens the speech of a given class. Contrary to the FEC Brief (at 39), the Colorado Party here does not claim "favored constitutional status" for political parties. Instead, the Colorado Party simply argues that, given the factual characteristics of political parties, restraints on their

coordinated activity substantially burdens their speech, and does not merely impose a marginal and limited constraint.

The FEC argues that some of the Founders were suspicious of political parties. The Founders were far more suspicious of government regulation of political speech. Hence, the First Amendment and hence the government's heavy burden of justifying any substantial restraints on speech. The issue here is not whether parties have some "exemption" from a governmental right to regulate (FEC Brief at 15, 22), but whether the FEC has justified the burden imposed on party speech by the Party Expenditure Provision limits. It has not.

Requiring individuals and PACs to sit on the left of the campaign train while candidates sit on the right may not much interfere with their journey. But a party and its candidate are joined at the hip. Ordering a party and its candidate to sit on opposite sides of the aisle is a very great imposition indeed. In short, FECA's limits on coordinated spending by a political party uniquely, directly and substantially burden the party's First Amendment rights.

B. This Direct And Substantial Burden Triggers A High Standard Of Justification By The FEC

Buckley applies classic strict scrutiny to all direct and substantial burdens on political speech. 424 U.S. at 44-45. No decision of this Court supports a lesser standard where such a substantial burden is found. As shown above, the Party Expenditure Provision limits directly and substantially burdens party speech. Thus, the FEC must prove that the limits are narrowly tailored to compelling problems that otherwise cannot adequately be addressed. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986); *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997).

The FEC Brief does not even claim to satisfy strict scrutiny. Instead, it argues (at 4) that coordinated party expenditures are classified by FECA as "contributions" and

that "restrictions on contributions require less compelling justification," *citing Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 903-04 (2000).

This Court has been clear, however, that First Amendment analysis turns on actual effects on speech, not on labels. *Colorado I*, Pet. App. 108a. Thus, *Shrink Mo.* looked behind the "contribution" label, finding a close similarity in structure and effect between the contribution limits at issue there and those evaluated in *Buckley*. 120 S. Ct. at 903-04, *citing Buckley*, 424 U.S. at 20-21. That similarity in effect (*i.e.*, only a "marginal" effect on speech) was the critical predicate of the Court's adoption of a lower standard. The direct and substantial burdens imposed by the Party Expenditure Provision limits negate any such similarities here.

But to the extent that labels matter, the FEC's argument still fails. Although FECA classifies most coordinated activity as a contribution, the Party Expenditure Provision uses the term "expenditure" for political party coordinated activities. § 441a(d). Consistent with this statutory classification, the FEC itself recently stressed that "coordinated party expenditures . . . are not contributions." *See supra* at 10.

In this particular case, however, little turns on which standard is applied. *Shrink Mo.* holds that, to justify even a classic *Buckley*-type contribution limit, the government must show that the limit is "closely drawn" (even if not truly "fine-tuned") to serve "a sufficiently important interest." 120 S. Ct. at 899. As the Court of Appeals held, and as we show below, the FEC's attempted justification of the Party Expenditure Limit fails even under the *Shrink Mo.* standard.

II. The FEC Has Not Shown That The Party Expenditure Provision Limits Prevent Actual Or Perceived Corruption

A. The FEC Offers No Evidence That A Modern Political Party Ever Has Corrupted A Member of Congress

Despite five and one-half years of discovery, *the FEC failed to identify a single instance in which a modern political party has corrupted a member of Congress.* The FEC, below (FEC C.A. Br. at 51-52), proffered four instances in which a political party or its leaders reportedly tried to affect the behavior of a candidate by withholding support. (C.A. App. Under Seal 91-94, at ¶¶ 234, 238, 239, 240). In three of the examples, the party rejected the proposed withholding. In one case, the Democratic party withheld support in an unsuccessful effort to persuade a candidate to refrain from attacking an opponent's homosexuality. In no example did a candidate change a position as a result. More important, in no example was the party's purpose corrupt.

B. The FEC's "Assumption" That Coordinated Party Spending Causes Corruption is Unreasonable

Tacitly conceding its lack of evidence to support a corruption rationale, the FEC Brief asserts (at 23) that "[i]t is reasonable *to assume* that large coordinated expenditures by political parties . . . may be used to exert influence over legislators' behavior while in office" (emphasis added). The first problem with this assumption is that, if parties actually used campaign support to influence official behavior, five and one-half years of discovery surely would have revealed abundant evidence. In fact, as just discussed, the FEC's evidentiary cupboard is bare. This lack of evidence is not surprising. To the contrary, there are many good reasons why the FEC's proposed "assumption" is unreasonable.

First, a political party's prime and overwhelming motivation is to elect as many candidates as possible, looking toward a majority that will permit the party to govern. The evidence is clear and undisputed that parties direct their support to candidates that have a chance to win, not to candidates with pliable policy views.

Second, a party's incumbent members of Congress tend to be its leaders. They are unlikely to be pushed around by offers to provide or threats to withhold campaign support. This is particularly true since incumbent members of Congress quickly develop their own sources of funding and typically do not receive substantial coordinated party support. Incumbent officeholders donate *more* excess campaign funds *to* their parties than the parties spend on *all* party congressional candidates combined.[20] This simple fact destroys the FEC's

[20] During the 1999-2000 election cycle, the National Republican Congressional Committee ("NRCC") reported coordinated expenditures of $3.6 million; and the Democratic Congressional Campaign Committee ("DCCC") reported $2.6 million. *See* reports *available at* <www.fec.gov>. At the same time, many incumbents made substantial transfers of "excess funds" from their campaign committees. The NRCC raised $18 million from its members in the House and the DCCC raised $7.7 million from its incumbents. Jonathan D. Salant, *More House Races Exceed $1 Million To Run Campaigns*, The Detroit News, Dec. 27, 2000, at 13, *available at* 2000 WL 30260249. Filings with the FEC show, for example, that on Mar. 30, 2000, Rep. Dick Gephardt transferred $100,000 to the DCCC. Rep. David Bonior contributed $100,000 to the DCCC on July 25, 2000. Rep. Dick Armey transferred $100,000 on July 26, 2000 to the NRCC and an additional $100,000 on Sept. 13, 2000.

Sen. Trent Lott transferred $200,000 to the National Republican Senatorial Committee ("NRSC") on June 20, 2000. Contributions were not limited to the party's leadership. Rep. Nancy Pelosi contributed $85,000 to the DCCC on Oct. 2, 2000. Retiring Sen. Connie Mack transferred $1.1 million from his campaign account to the NRSC on June 29, 2000.

Amici also supported their party. For instance, Rep. Christopher Shays transferred $10,000 to the NRCC on Mar. 1, 1999, and Rep. Sherwood Boehlert made contributions to the NRCC of $15,000 on July 2, 1999, and $25,000 on Oct. 10, 2000. *See* reports of respective candidate committees filed with the FEC.

speculation that political parties use coordinated spending to control the votes of its members of Congress.

Third, and relatedly, non-incumbent challengers and open seat candidates are the primary beneficiaries of party campaign support. For example, in 1996, the Democrats spent 85% of their Senate coordinated expenditures and 80% of their House coordinated expenditures to support non-incumbents. (JA 76 at ¶ 75, 201-02). At the time such non-incumbents are seeking office, they are not in a position to provide official favors.

Fourth, FECA's extensive reporting and disclosure requirements, combined with a vigilant press and our democratic system of government strongly discourage corruption. Parties and candidates who are seen to be engaged in questionable behavior are swiftly punished, both in terms of contributions and votes.

Congress never assumed, much less made a legislative finding, that parties corrupt their candidates. *See infra* at 36-37. To the contrary, in adopting FECA, Congress had a positive view of parties. *Colorado I*, Pet. App. 104a. Nor does *Buckley* or any comparable source justify belief that modern parties corrupt members of Congress. To the extent the public has any relevant concern, it arises from large soft money contributions, as is discussed below.

"Assumptions" are not proof, but even if they were, the FEC's proposed assumption that party spending causes corruption is unreasonable.

C. The Public Perception Of Corruption Discussed By The FEC Traces To Large Contributions Of Soft Money, Not To Coordinated Expenditures Of Hard Money

In the lower courts the FEC strongly stressed public perception of corruption as the key justification for the Party Expenditure Provision limits. In this Court the FEC Brief includes only passing references to "perceived corruption," (at 25 n.9) or "apparent corruption" (at 23). The reason for this shift is simple: the present public concern over money and politics overwhelmingly results from large contributions of soft money. There is absolutely no evidence that the public is concerned about parties' use of hard money to support their candidates. The FEC's proffered concern over public perception is a red herring. *See* Pet App. 88a-89a (district court opinion); (JA 61-64).

D. Congress Never Found That Coordinated Party Spending Causes Actual Or Perceived Corruption

In another effort to excuse its lack of evidence, the FEC Brief argues (at 47-49) that this Court should defer to Congress' "legislative judgments" concerning "prevention of corruption." However, the FEC Brief *never identifies any evidence of the supposed congressional judgment concerning corruption.*[21] In fact, the Party Expenditure Provision reflects Congress' attempt to reduce the overall level of spending on federal campaigns, not any concern over corruption.[22]

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[21] Similarly, *Amici* members of Congress fail to identify any such evidence. The *Amici* political scientists concede (at 3, 21) that their real concern is with large soft money contributions and that they seek to preserve the present limits on coordinated hard money spending as a legislative bargaining chip.

[22] The expenditure formula belies an anticorruption motive. As noted above, at 2 n.2 & 12 n.10, parties in large states, *e.g.*, California, or New York, may spend millions of dollars in coordinated speech on behalf of Senate candidates, while the Colorado Party may spend only $202,072. Under the FEC's various theories, the risk of corruption increases with the amount of coordinated spending. Congress apparently saw no such risk.

This issue was fully ventilated in *Colorado I*. There the plurality said (at Pet. App. 104a):

> this Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of restricting what it saw as wasteful and excessive campaign spending. . . In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections.

It would be perverse to excuse a lack of evidence of a corruptive threat by deferring to a congressional judgment that Congress never made.

The FEC Brief asserts (at 25 n.9), that since Congress reenacted FECA after *Buckley*, it must have concluded that the Party Expenditure Provision was justified as an anti-corruption measure. That assertion simply turns a blind eye to history. *Buckley* left the country with an impending election and no election law. Congress and the administration raced to pull together whatever *Buckley* had not invalidated into emergency legislation to govern the election. There was no reevaluation of provisions that *Buckley* had left standing.[23]

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[23] In presenting the administration's revised FECA to deal with the emergency situation created by *Buckley*, then Assistant Attorney General Antonin Scalia explained: "The whole purpose of our bill is to submerge those issues that are controversial and to do the minimum amount necessary to enable the 1976 elections to proceed." Office of Legal

Casting about for some predicate for congressional deference, the FEC Brief (at 28) offers for the first time in this Court a lengthy quotation from a 1973 floor statement of an individual senator concerning a bill that never was enacted. That senator was concerned that, by allowing individuals to contribute $100,000 to a party (equivalent to over $300,000 today), there might be some temptation to impropriety. Isolated floor remarks concerning an unenacted bill carry no weight. *See Garcia v. United States*, 469 U.S. 70, 78 (1984). But beyond that, the present FECA contribution limits of $5,000 and $20,000 combined with the anti-earmarking provisions clearly eliminate the temptation that concerned the senator.

Moreover, as Justice Thomas pointed out in his *Colorado I* opinion, there are institutional reasons here why this Court should play its traditional independent role in assessing First Amendment burdens. Pet. App. 135a & n.9. As has been discussed above (at 11-12), party support is particularly important to challengers, while FECA was enacted by incumbents. In this particular political area, the deference the FEC seeks would "amount to letting the fox stand watch over the henhouse." *Id.*

Finally, even if Congress made a "legislative judgment" that a spending limit prevents corruption, no deference should be accorded if the judgment is unsupported or insupportable. This Court did not defer to Congress when it struck down limits on candidate contributions (*Buckley*, 424 U.S. at 23-24), campaign spending limits (*id.* at 22), or independent expenditure limits on individuals (*id.* at 50), committees (*FEC v. National Conservative PAC*, 470 U.S. 480 (1985)), or political parties (*Colorado I*). It should not defer here.

Counsel Statement accompanying § 2911, Legislative History of FECA Amendments of 1976 at 142 (Feb. 18, 1976).

III. The FEC Has Not Shown That The Party Expenditure Provision Limits Prevent Circumvention of Other Limits

A. The FEC Offers No Evidence That Circumvention Is A Genuine Problem

Buckley rejected the argument that limits on independent campaign expenditures could be justified as a means of preventing circumvention of the contribution limits, saying (at 424 U.S. at 56):

> There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussions of such violations will be insufficient to police the contribution provisions.

The FEC offers no evidence that circumvention actually occurs, much less that it is a sufficient problem to justify substantial and direct restraints on speech. The FEC Brief's seven-page circumvention argument is littered with the language of speculation, *e.g.*, a donor "*could* contribute additional amounts . . . and *could* in various ways communicate the expectation" that funds go to a candidate. FEC Brief at 25-26 (emphasis added). Despite years of discovery, there is no evidence that circumvention *does* occur, even though it could happen under present law.

In a lengthy footnote (at 31-32 n.14), the FEC Brief discusses the "tally system" by which the Democratic Senatorial Campaign Committee ("DSCC") kept track of the extent to which Senators generated financial contributions to the party. In a 1995 Conciliation Agreement in Matter Under Review ("MUR") 3620, however, the FEC approved the tally system on condition that earmarking be clearly disclaimed.

The tally system is discussed at length in the Declaration of Robert Hickmott (JA 244-53). That Declaration was obtained by the FEC following ex parte contacts and is drafted to give

maximum credence to the FEC's position. Nevertheless, Mr. Hickmott makes clear that:

- The DSCC carefully refrained from any "contract" as to how tally funds would be spent because "that would be earmarking, which is illegal" (JA 250).
- The DSCC carefully reviewed the fundraising letters of candidates to make sure they did not mislead contributors as to the operation of the tally process (JA 250).
- The DSCC allocated money raised through the tally process based upon "the financial strength of the campaign itself, including how much they had raised on their own behalf and how much there was on tally for the DSCC, and what their poll numbers looked like," as well as "who had the best chance of winning or who needed the money most" (JA 250-51).
- The "bottom line" of the tally system is that "some candidates get back more money than they raise, and others get less" (JA 250).[24]

Other of the FEC's declarants made the same points. Senator Simon explained that the tally system "made clear that this is not just automatic, so that no one could say if Tom Smith contributed $5,000 to the DSCC, that was a way of laundering it coming to Paul Simon" (FEC Brief at 32 n.14). Similarly, an aide to Senator Fowler explained that "we were not able to tell these contributors that the money could come back directly to help us," but that tallied contributions were "an indirect help to Mr. Fowler." *Id.*

[24] Also of interest is Mr. Hickmott's testimony that: "I am not aware of any instance in which a Senator who had to cast a particularly difficult vote was promised DSCC money in return for that vote" (JA 253).

In 1996, before this Court, the circumvention theory was first raised. The Colorado Party responded as follows:

> Amicus Common Cause argues (Br. 10-11) that party spending limits are necessary to prevent Senate candidates from becoming beholden to donors who, notwithstanding § 441a(a)(8), can contribute up to $120,000 ($20,000 per year) to a national party during a candidate's six-year term in addition to the $2,000 statutory maximum to the candidate. This argument is misleading on several levels. First individuals may not contribute $20,000 per year to a state political party like the Colorado Party. *See* § 441a(1)(C) (limiting annual contributions to $5,000). Second, individuals are limited to making $25,000 in total contributions to campaigns, PACS and party committees in any given year. § 441a(a)(3). Therefore, although an individual may contribute up to $20,000 per year in unearmarked funds to a national party, the individual would consequently be limited to contributing $5,000 to all other parties, PACS, and campaigns. Further, Common Cause ignores the impact of inflation on FECA's party-spending limits during the last two decades. In 1974 dollars, the Colorado Party's $5,000 contribution limit is worth only $1,618.12 today; the $20,000 limit to national parties is worth only $6,472.48. *See* FEC 22 Record 4 at 15 (Apr. 1996). Finally, *Common Cause did not cite a single example of such a contribution pattern in the 20 years of FECA.*

Colorado I Reply Brief at 5-6 n.5 (emphasis added). Another five years have passed and still neither the FEC, nor any *amici*, has identified a single example of such a contribution pattern during the 25 years of FECA.

The FEC's lack of evidence of circumvention is not surprising. FECA provides interlocking multilayered provisions designed to prevent circumvention. For example,

individuals are limited to giving $1,000 per year to a particular candidate or campaign committee. That limit is backed up with annual limits of $20,000 on contributions to a national party and $5,000 to a state party or a PAC. Those limits are further bolstered by an annual $25,000 limit on all hard money contributions by a contributor.[25] These limits are enforced by stringent reporting and disclosure requirements. On top of all of this, FECA restricts both donors that attempt and conduits that facilitate evasion of limits by "earmarking" contributions to particular candidates or campaigns. Knowing violation of any of these restrictions can lead to as much as a year in jail, not to mention the political consequences. Similar disclosure requirements and restrictions apply to PACs as well as individuals.

The FEC declarants who addressed the DSCC tally system were clear that the DSCC was careful to avoid violating FECA. Their testimony proves that FECA's restraints already are effective. Conduct to which the FEC objects, such as the tally system, occurs because it is lawful. If Congress wants to stop such conduct, it can simply forbid it, rather than relying on oblique disincentives that limit party speech.

The FEC Brief asserts (at 27-29) that Congress believed that circumvention might occur. As discussed above (at 38), the FEC proffered as evidence floor remarks made in 1973 concerning a bill that Congress never enacted. The remarks of these Senators focused on a provision allowing an individual to contribute $100,000 (equivalent to $300,000 today) directly to a party. The professed concern was that such a massive contribution might give rise to temptations that would not be resisted.

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[25] Thus, if a contributor gave $5,000 to a state committee of a party, and $20,000 to the national committee of that party, the contributor could make no additional hard money contributions to any candidate, committee, or PAC during the calendar year.

Under FECA, however, an individual at most can give $20,000 to a national party committee and $25,000 total in all hard money contributions in any calendar year. That is a very small fraction of the amounts that the individuals quoted by the FEC found to be of concern.

The FEC Brief argues (at 29) that *Buckley* (424 U.S. at 38) "upheld FECA's $25,000 annual aggregate limit on individual contributions" to restrict "the possibility of evasion," and *California Med. Ass'n v. FEC*, upheld a similar aggregate limit. 453 U.S. 182, 198 (1981). However, those aggregate limits directly targeted contribution amounts and obviously were adopted to reinforce more specific limits. Moreover, they raised little First Amendment concern since the much lower specific limits had been held to impose only a marginal burden on speech. 424 U.S. at 20. Individual aggregate limits are not analogous to the Party Spending Provision, which has no obvious relationship to contribution limits and was enacted to reduce the overall level of campaign speech. Moreover, the Party Expenditure Provision limits' direct and substantial burdens on party speech raise very different considerations.

B. The FEC's Circumvention Theory Would Stand The First Amendment On Its Head

The FEC's circumvention argument attempts an end run around the First Amendment. As is shown above (at 25-26), contribution limits on individuals and PACs were sustained because they were found to impose only marginal and limited burdens on First Amendment rights. Now, to indirectly reduce the speculative possibility contribution limits might be circumvented (notwithstanding the anti-earmarking provision and other structural protections), the FEC proposes to sustain the direct and substantial burden on party speech imposed by the Party Expenditure Provision limit. That truly would stand the First Amendment on its head. The FEC cites no authority to sustain such a circumvention theory, and we know of none.

IV. The FEC's Proposed Justifications Fall Short, Regardless Of The Applicable Standard Of Scrutiny

A. The FEC's Theories Of Justification Are Novel And Implausible And Thus Require Substantial Support, Which Is Lacking

Shrink Mo. holds that "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary . . . with the novelty and plausibility of the justification raised." 120 S. Ct. at 906. It held that Missouri had met its burden because (i) in light of *Buckley*, the government's claim that such limits prevented corruption was neither novel nor implausible, (ii) the state submitted evidence of a legislative finding that the contribution limits avoided a "real potential to buy votes," and (iii) the district court found as a fact that the 74% of Missouri's referendum voters who approved the limits reasonably believed that the limits would prevent corruption. 120 S. Ct. at 906-08. *Shrink Mo.* also noted the absence of substantial countervailing evidence. *Id.* at 908.

By contrast, the FEC's justifications are both novel and implausible. No ruling of this Court suggests that a party's expenditure of its hard money to support its own candidates is likely to be corrupting.[26] Certainly, no such judgment was made by Congress, which had a positive view of parties and adopted the Party Expenditure Provision primarily to reduce

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[26] To the contrary, this Court recently stated that:

> our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences."

California Democratic Party v. Jones, 120 S. Ct. 2402, 2408 (2000) (citing *Ev v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989)).

the overall level of campaign speech. *Colorado I*, Pet. App. 104a. No public referendum or similar information demonstrates that the public is concerned over the level of coordinated party speech funded by hard money, as opposed to large soft money contributions. Nor is it plausible that hard money contributions, received pursuant to FECA's limits, are a likely source of corruption. While parties are led by people, and people are not perfect, there is no reason to believe that FECA's regime of disclosure, limits, and sanctions, backed up by a vigilant press and the scrutiny of political opponents, is inadequate to encourage compliance with the law.

Equally novel and implausible is the FEC's claim that the Party Expenditure Provision is necessary to prevent circumvention of FECA's limits on individual and PAC contributions. As just discussed, that is not why Congress adopted the Party Expenditure Provision. No holding of this Court suggests that a circumvention problem exists that must be dealt with by limiting a party's hard money funded speech. To the contrary, the FEC Brief's discussion of the DSCC tally system shows that that committee scrupulously obeys the law. Nor is the Party Expenditure Provision a natural or direct way to prevent circumvention of limits on individual and PAC contributions.

The FEC had ample opportunity to develop the evidence. This is not a case in which a lower court has acted swiftly and with limited discovery to prevent an imminent First Amendment threat. Instead, this is a case in which, after four years of initial discovery, this Court remanded for further inquiry, giving the FEC yet another year and one-half to submit evidence. The fact that a lengthy intense, and focused inquiry found no evidence of a circumvention problem is compelling evidence that no such problem exists.

Moreover, the Colorado Party presented strong evidence that coordinated party spending is not corruptive but is desirable. The Colorado Party did not merely cite to

"academic studies" as occurred in *Shrink Mo.* 120 S. Ct. at 900. Rather, the Party's experts developed comprehensive reports that then were tested in the crucible of cross-examination. The FEC's inability to overcome this strong evidence further confirms that the Party Expenditure Provision cannot be justified.

In sum, the district court and the court of appeals correctly concluded that the FEC has failed to show that the Party Expenditure Provision limits serve sufficiently important interests to meet the standard mandated by *Shrink Mo.*, much less the compelling interest demanded by strict scrutiny.

B. The Party Expenditure Provision Limits Are Not Closely Drawn To The FEC's Proffered Justification

If the FEC could establish that the Party Expenditure Provision limits serve sufficiently important interests, the *Shrink Mo.* standard then would require a demonstration that the limits are "closely drawn" to serve those interests. 120 S. Ct. at 899. The FEC Brief makes no apparent effort to meet this requirement. Nowhere does the Brief identify specific interests and then undertake to show that the Party Expenditure Provision is shaped to deal with that interest while avoiding unnecessary First Amendment burden. Nor could such a showing be made.

The FEC's theories of actual, potential, and perceived corruption overwhelmingly start with a concern over large contributions to a political party. If such concerns are substantial, a closely drawn response would be to reduce the allowable size of contributions. *Colorado I*, Pet. App. at 132a.[27] While over regulating hard money, Congress and the

[27] The *Amici* political scientist (at 3) advocate *increasing* hard money contribution limits. Moreover, the Shays-Meehan Bill passed by the last Congress would have increased individual contributions to state parties to

FEC to date have failed to limit soft money contributions. To address supposed corruption concerns by restricting a political party's use of hard money to fund coordinated speech is fairly described as irrational and perverse.

The FEC Brief argues (at 33) that, because political parties are run by people, and people are not perfect, party support must be feared. However, the people who run parties operate within a unique network of institutional and legal constraints that make manipulation of party speech a most unlikely route of corruption—as experience has shown. Moreover, the FEC's argument proves too much. By the FEC's rationale, candidates should not be allowed to have *any* important relationships with any person or institution controlled by people.

Tellingly, the FEC Brief relegates its one factual discussion—that concerning the DSCC tally system—to a footnote (at 31-32 n.14). If the tally system of one party committee (the DSCC) circumvents the ban on earmarking—a proposition the FEC has rejected—the closely drawn solution would be to make the anti-earmarking law clearer. The FEC's own declarants uniformly attested that those who operated the tally system were scrupulously careful to obey their understanding of the law as enunciated by the FEC in MUR 3620. To address the supposed circumvention problem by restricting every party's ability to use hard funds to engage in coordinated speech with its candidates is truly tangential and obscure. It is not a closely drawn response.

The truth is that the FEC Brief is hard pressed to show that the Party Expenditure Provision limit even affects the concerns that the FEC proffers as justifications. The FEC Brief does not and cannot show that the limits are closely

$10,000 per year, doubling the size of the current limit. H.R. 417. McCain-Feingold would have done the same. S. 1593.

drawn to those interests, much less that the narrow tailoring required by strict scrutiny has been achieved.

V. The Party Expenditure Provision Limits Are Void For Overbreadth

Where a provision substantially burdens speech in ways that the government has not justified, and there is "no core of easily identifiable and constitutionally proscribable conduct" to which a limiting construction can confine the provision, then the entire provision is invalid for overbreadth. *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984); *see Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (First Amendment overbreadth must be substantial). Indeed, if a provision imposes impermissible First Amendment burdens only "at its margins," but cannot be narrowed to "easily identifiable and constitutionally proscribable" conduct, it must be invalidated. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *see New York v. Ferber*, 458 U.S. 747, 773 (1982) (stating rule but declining facial invalidity where the "arguably impermissible applications" amount to "no more than a tiny fraction" of the provision's legitimate scope).

The FEC Brief observes (at 20) that FECA's restrictions on coordinated party expenditures restrict a range of conduct. At one extreme, largely independent party speech is limited if the candidate has requested the speech or if the party has consulted or coordinated with the candidate. § 441a(a)(7)(B)(i). At the other extreme, speech that originates with the candidate but that the party agrees to support financially is coordinated and, therefore, limited. § 441a(a)(7)(B)(ii). In between is a vast middle ground where the candidate and party work together to develop, produce, and distribute position statements and ads reflecting the positions of both party and candidate. (JA 198, 207-16).

The FEC Brief does not contend that the Colorado Party's arguments, if accepted, invalidate only marginal or

insubstantial aspects of FECA's restrictions on coordinated speech. Nor do the coordination provisions have an easily identifiable core that would be proscribable even if the Party's position prevails. Thus, FECA's categorical restrictions on coordinated spending in connection with congressional elections fail in their entirety.

The proper course here is to invalidate subsection (3) of the Party Expenditure Provision, § 441a(d)(3).[28] That would leave in place subsection (1), § 441a(d)(1), which "exempt[s] political parties from the general contribution and expenditure limitations of the statute." *Colorado I*, Pet. App. 96a.[29] It also would leave in place subsection (2), § 441a(d)(2), which imposes limits on coordinated spending in presidential races.[30] The only effect of invalidating subsection (3) would be to eliminate restrictions on coordinated party spending in congressional elections.[31]

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[28] The district court's judgment referred to all of § 441a(d) as invalid. Pet. App. 91a. However, the text of the opinion is clear that the limits in subsection (3) are the target of the ruling. The court of appeals understood the judgment to invalidate subsection (3). Pet. App. 1a-2a.

[29] The relevant language of subsection (1) is as follows:

> Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions [political parties] may make expenditures in connection with the general election campaign of candidates for federal office . . .

[30] Because the element of public financing of presidential elections may affect the analysis, the Colorado Party in this action has not challenged the limits on coordinated spending in presidential campaigns established by § 441a(d)(2).

[31] The FEC's Brief in *Colorado I* argued (at 17) that, if subsection (3) is invalidated, the exception from other restrictions granted by subsection (1) also would evaporate, leaving parties subject to the same $5,000 limit on coordinated spending and contributions that applies to PACs. Such a result would be bizarre, however, since the rationale for striking subsection (3) would be that even higher limits are an unconstitutional burden on party speech and association. Given FECA's strong

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

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severability provision, § 454, there is no reason that striking subpart (3) should impair subpart (1).

The FEC Brief suggests (at 5-6 n.3) that § 441a(a)(2) imposes a $5,000 limit on money contributions by a party to its candidate, notwithstanding § 441a(d)(1). The Colorado Party has not challenged that position in this action and takes no position concerning it, provided the limit is not construed to reach coordinated party expenditures.

The Colorado Party's Amended Complaint expressly asserts that all limits imposed by FECA on coordinated speech are invalid "(i) facially, (ii) as applied to political parties such as the State Party, and (iii) as interpreted by the FEC." (JA 23). If the Court declines to hold subsection (3) facially invalid, it should declare that FECA cannot constitutionally be applied to restrict coordinated party speech in connection with congressional elections.

Party Activity on Behalf of Senators Filing Amicus Brief

Senator	Party	State	Election	Winning Percentage	Party Contributions	Party Coordinated Expenditures	Receipts of Campaign*	Percentage of Receipts	Source
[redacted]									
Russell D. Feingold	D	Wis.	1998	50%	$ 850	$ 118,608	$ 4,072,878	2.9%	(B)
Russell D. Feingold	D	Wis.	1992	52%	$ 27,587	$ 353,210	$ 1,996,312	19.1%	(C)
[redacted]									
John McCain	R	Ariz.	1998	68%	$ 1,000		$ 4,450,544	0.0%	(B)
John McCain	R	Ariz.	1992	55%	$ 18,500	$ 302,528	$ 3,344,311	9.6%	(C)
[redacted]									
Charles E. Schumer	D	N.Y.	1998	54%	$ 500	$ 2,575,200 †	$ 16,825,671	15.3%	(B)

ADDENDUM A

Sources:

(A) Press Release, Federal Election Commission, FEC Reports Major Increase in Party Activity for 1995-96 (rel. Mar. 19, 1997) at pp. 12-13.
(B) Press Release, Federal Election Commission, FEC Reports on Political Party Activity for 1997-98 (rel. April 9, 1999) at pp. 13-15.
(C) Press Release, Federal Election Commission, Democrats Increase Spending by 89% in the '92 Cycle (rel. Jan. 1994) at pp. 7, 9.

*** Election Cycle only.**
† The Total Party Coordinated Expenditures for Senator Schumer include $560,000.05 from the Liberal Party of New York State and $439,700 from the Independence Party Federal Committee. See FEC Disclosure Report Search Results at http://www.fec.gov.

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No. 00-191

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN
FEDERAL CAMPAIGN COMMITTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

As we explain in our opening brief (at 5-6, 18-19), the statutory provision at issue in this case (2 U.S.C. 441a(d)) does not impose any special disadvantage on political parties. Rather, the effect of Section 441a(d) is to allow party committees to make coordinated expenditures in support of their candidates for federal office in amounts far greater than the limits that apply to other donors. Our opening brief further explains (at 16-18) that, as applied to individuals and to organizations other than political parties, the coordinated expenditure limits contained in the Federal Election Campaign Act of 1971 (FECA) have previously been sustained by this Court as a constitutionally permissible means of addressing the danger of actual or

perceived political corruption. Thus, the question in this case is whether a party committee is entitled by the First Amendment to a complete exemption from coordinated spending limits that are valid as applied to other persons.

Respondent offers two basic arguments in support of its claim to such an exemption. First, respondent contends (Br. 25-32) that a restriction on coordinated spending—or, to put it a slightly different way, a requirement that spending in excess of the applicable FECA limit must be made independently of the candidate—imposes greater burdens on political parties than on other donors. Second, respondent argues (Br. 33-49) that the government has failed to demonstrate the corruptive potential of coordinated spending by political parties. For the reasons that follow, those arguments lack merit.

I. THE DISTINCTIVE RELATIONSHIP BETWEEN POLITICAL PARTIES AND THEIR CANDIDATES PROVIDES NO BASIS FOR FACIAL INVALIDATION OF THE FECA'S LIMITS ON COORDINATED PARTY SPENDING

Respondent contends that the FECA limits on coordinated expenditures impose greater burdens on political parties than on other donors because (a) "[p]arties exist precisely to elect candidates that share the goals of their party" (Br. 26), and (b) "political parties find independent speech to be much less effective than coordinated speech" (Br. 29). Those arguments provide no basis for facial invalidation of the FECA's limits on party-coordinated expenditures.

A. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld the FECA's limitations on contributions, finding that they serve a compelling

government interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25; see *id.* at 23-38. The Court recognized as well that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act," in order to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 46, 47.

The Court struck down the Act's restrictions on independent expenditures, however, concluding that "the independent advocacy restricted by the [FECA] does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46. The Court explained that

> [u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 47; see *id.* at 39-59. Thus, respondent's assertion that its independent expenditures are "much less effective than coordinated speech" provides no basis for distinguishing political parties from other would-be donors. To the contrary, the view that independent expenditures will *generally* be less efficacious than co-

ordinated spending in bringing about the election of the payor's favored candidate was a central premise of the *Buckley* decision.

B. Respondent contends (Br. 29) that the extensive interaction between candidates and party officials during the course of a campaign makes it especially difficult and inefficient for the party to establish and maintain independence from the candidate with respect to particular expenditures. Respondent offers no meaningful support for that statement beyond the bare assertion that it is so.[1] But even if respondent's contention were empirically well-supported, the difficulty of making independent expenditures would not entitle any particular donor to make coordinated expenditures in excess of the FECA limits. No individual or non-party organization would be permitted to grant itself (in effect) an exemption from the FECA's coordinated spending limits simply by establishing a relationship with a candidate that made independent expenditures infeasible. Even assuming arguendo the empirical accuracy of respondent's assertion— *i.e.*, that the existence of a particularly close overall relationship between a candidate and a political committee makes it more "complex, expensive, and difficult" (Resp. Br. 29) for the organization to make independent expenditures in the candidate's support—respondent is simply confronted with the same choice that the FECA requires of any other organization engaged in political advocacy.

C. As we explain in our opening brief (at 39-49), political parties have no constitutional entitlement to an exemption from the coordinated spending limits that apply to other potential donors. Congress has recognized, however, that parties have come to play a role in the Nation's electoral processes significantly different from that of other political organizations. Section 441a(d) facilitates the parties' performance of their distinctive functions by authorizing state and national party committees to make coordinated expenditures that would otherwise substantially exceed the Act's limitations on contributions to candidates. See Gov't Br. 18-19.

Thus, insofar as the maintenance of independence from the candidate with respect to particular expenditures might be thought to entail greater practical burdens on party committees than on other political organizations, Section 441a(d) alleviates the disparity

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[1] Under the FECA, the distinction between independent and coordinated expenditures turns on whether an expenditure is made "in cooperation, consultation, or concert, with" the candidate or his agents. 2 U.S.C. 441a(a)(7)(B)(i). As this Court's decision in *Colorado I* shows, the general role of party officials in supporting the party's candidates does not necessarily preclude the party from acting independently of the candidate with respect to individual expenditures. Respondent acknowledges (Br. 17) that so-called "soft money" (see Gov't Br. 32) cannot be spent in coordination with a candidate for federal office; yet the volume of "soft money" spending by the two major political parties is very large and growing rapidly. See *Party Fundraising Escalates*, FEC News Release at 2 (Jan. 12, 2001) (available in www.fec.gov) (reporting that from January 1, 1999, through November 27, 2000, "Republicans raised $244.4 million [in soft money], an increase of 73% over the same period in 1995-96, the last presidential cycle, while Democrats raised $243 million, a 99% increase"). And while soft money cannot be used for communications that expressly advocate the election or defeat of a candidate for federal office, it has frequently been used for advertisements that focus on the merits of particular federal candidates. See *Mariani* v. *United States*, 212 F.3d 761, 768 & n.4 (3d Cir.) (en banc), cert. denied, 121 S. Ct. 564 (2000). That pattern of spending indicates that political parties have in fact successfully engaged in substantial campaign-related advertising without coordinating with their candidates.

by authorizing parties to engage in substantially greater coordinated spending than the Act otherwise allows. As our opening brief explains (at 47-49), the task of fashioning an appropriate balance between facilitation of the parties' distinctive functions and the prevention of political corruption is preeminently a legislative endeavor. Respondents have offered no persuasive ground for concluding that Congress has drawn the balance in a constitutionally unacceptable manner.

D. As our opening brief explains (at 20-21), the effect of the court of appeals' decision is to preclude enforcement of the FECA limits on party-coordinated expenditures even with respect to party spending (*e.g.*, payment of the candidate's bills) that is the functional and constitutional equivalent of a direct contribution of money. Respondent does not explain how the FECA limits on that form of coordinated spending subject political parties to greater hardship than other political committees experience as a result of the analogous (though much lower) limits applicable to them. Indeed, respondent expressly disavows any constitutional challenge to the FECA's $5000 limit on the amount that a political party may contribute to one of its candidates. See Resp. Br. 50 n.31.

Nor does respondent suggest—much less demonstrate—that expenditures of the sort described above constitute an insubstantial portion of overall party-coordinated spending. Respondent asserts (Br. 25) that Section 441a(d) "limits party speech," based on its expert's determination that "[o]ver 90% of the monies spent by national party committees on behalf of their candidates is spent on political communication." Respondent's statement is apparently intended to convey the impression that most party-coordinated spending is devoted to communication of the party's

own ideas. But money "spent on political communication" would include "direct payment of a candidate's media bills"—a form of coordinated expenditure that involves no meaningful communication by the party itself, and that the plurality in *Colorado I* characterized as "virtually indistinguishable from simple contributions." Pet. App. 111a. Indeed, the *same* expert stated, with respect to the national parties' coordinated expenditures, that "[t]he predominant approach is to provide candidates with the funding needed to broadcast their messages or post letters to selected voters within their districts." J.A. 209; see Gov't Br. 20-21. That Section 441a(d) constrains a political party's ability to pay for its candidates' speech does not mean that the statute significantly impairs the party's ability to engage in its own communication.[2]

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[2] Respondent attaches significance to the Federal Election Commission's statement, in a *Federal Register* notice, that "coordinated party expenditures . . . are not contributions." Resp. Br. 10 (emphasis omitted); see Resp. Br. 32. The import of the Commission's *Federal Register* statement, however, was simply that for *recordkeeping* purposes, a party's coordinated expenditures in support of its federal candidates must be reported separately from its direct monetary contributions. See 62 Fed. Reg. 50,712 (1997). In addition, the FECA distinguishes between party-coordinated expenditures and party contributions to candidates to the extent of establishing separate limits for each. See Gov't Br. 5-6 n.3. Those technical distinctions under the statute and regulations are in no way inconsistent with this Court's repeated recognition that for *constitutional* purposes, coordinated expenditures are regulable on the same terms as direct contributions. That equivalence is particularly clear with respect to coordinated expenditures, such as payment of a candidate's bills, that involve no meaningful communication of the party's own views.

II. THE FECA LIMITS ON PARTY-COORDINATED EXPENDITURES ARE A REASONABLE AND CONSTITUTIONALLY PERMISSIBLE MEANS OF PREVENTING ACTUAL OR APPARENT POLITICAL CORRUPTION

Respondent's principal argument is that the government has failed to demonstrate a sufficient logical or empirical connection between party-coordinated expenditures and political corruption to justify the spending limits imposed by Section 441a(d). For the reasons that follow, that argument is unsound.

A. As our opening brief explains (at 31-32 n.14), the Federal Election Commission introduced extensive evidence indicating that donors who have contributed the maximum permissible amount to an individual candidate are frequently urged to contribute additional sums to the candidate's party, and through informal understandings are encouraged to expect that the party will make equivalent expenditures in support of the candidate's campaign. The purpose and effect of fundraising techniques like the "tally system" is that both the donor and the candidate are aware of the causal connection between the donor's contribution to the party and the candidate's subsequent receipt of financial support. See, *e.g.*, J.A. 273 (former Senator Tim Wirth asserts that in soliciting funds for the state party, he "understood that the solicitees who made contributions to the party almost always did so because they expected that the contributions would support my campaign one way or another, and for the most part they expected I would remember their contributions"). Under those circumstances, the corruptive potential of the private donation is not meaningfully less than if the contribution were made directly to the candidate

himself. Although Section 441a(d) does not entirely prevent such arrangements, it substantially reduces the potential for circumvention of the caps on contributions to candidates by limiting the aggregate amounts of money that can be channeled through the parties.[3]

In asserting that "the FEC failed to identify a single instance in which a modern political party has corrupted a member of Congress" (Resp. Br. 33 (emphasis omitted)), respondent apparently means that the evidence presented to the district court identified no occasion in which party-coordinated spending was demonstrably used to alter the voting behavior of a Member of Congress. But nothing in this Court's decisions suggests that empirical evidence of that nature is necessary in order to sustain a campaign funding restriction that is premised on an anti-corruption rationale. Indeed, while the Court in *Buckley* referred in passing to "the deeply disturbing examples [of political corruption] surfacing after the 1972 election," 424 U.S. at 27; see *id.* at 27 n.28 (explaining that "[t]he Court of Appeals' opinion in [*Buckley*] discussed a

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[3] The fact that the tally system is not itself unlawful (see Resp. Br. 39-40, 42) does not reduce the force of our argument on this point. To the contrary, the absence of any legal prohibition on arrangements (like the tally system) that do not involve definite commitments by the party, but that nevertheless create a practical danger of circumvention of the FECA contribution limits, reinforces the propriety of Section 441a(d)'s caps on party-coordinated expenditures. Nor is there merit to respondent's argument (Br. 42) that Congress is constitutionally required to broaden the earmarking prohibition contained in 2 U.S.C. 441a(a)(8) in preference to restricting party-coordinated spending. An effort to broaden the earmarking ban (*e.g.*, by prohibiting donors to the party from expressing to party officials their particular support for individual candidates) could itself raise serious First Amendment concerns.

number of the abuses uncovered after the 1972 elections"), neither this Court nor the court of appeals in that case identified any instance in which a legislator's vote was shown to have been altered by the receipt of large contributions. Rather, the thrust of the evidence to which the Court alluded was simply that large campaign contributions by persons having an interest in the outcome of a government decision would create a significant *danger* (and a corresponding public perception) of "improper influence" (*Buckley*, 424 U.S. at 27; *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 905 (2000)) based on financial largesse. See *Buckley* v. *Valeo*, 519 F.2d 821, 839-840 (D.C. Cir. 1975).[4]

B. In emphasizing the supposed dearth of evidence regarding the corruptive effects of party-coordinated expenditures, respondent altogether ignores the fact that the FECA has limited party spending for over 25 years. Questions concerning the corruptive potential of unrestricted party-coordinated spending therefore must necessarily be resolved on the basis of logical inferences regarding the likely consequences of a future change in the governing legal regime. Cf. *Burson* v.

[4] Much of the evidence on which the court of appeals in *Buckley* relied indicated that "[l]arge contributions are intended to, and do, gain access to the elected official after the campaign for consideration of the contributor's particular concerns." 519 F.2d at 838; see *id.* at 839-840 nn.36-38. The court evidently regarded the purchase of access as an appropriate object of congressional concern, even in the absence of direct evidence that votes in Congress or substantive government decisions had been altered in response to large campaign contributions. Similarly in the instant case, the Commission introduced substantial evidence that party committees solicit large contributions to the party through promises to facilitate meetings between donors and the party's Members of Congress. See, *e.g.*, J.A. 91-93, 96-98.

Freeman, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) ("The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them.").[5]

As our opening brief explains (at 18-19, 49), Congress in establishing limits on party-coordinated spending has endeavored to strike an appropriate balance between the prevention of actual or apparent corruption and the desire to "assur[e] that political parties will continue to have an important role in federal elections." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981). That effort is in keeping with this Court's recognition that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982) (quoting *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981)). The constitutional legitimacy of the balance struck by Congress can scarcely be thought to depend on proof that Section 441a(d) has failed to achieve its objective.

C. The FECA limits on federal campaign contributions (defined to include coordinated expenditures) rest on Congress's judgment that donations above the statutory limits create a sufficient *risk* of actual or perceived political corruption to warrant the adoption of a prophylactic rule. In *Buckley*, this Court sustained

[5] By contrast, the contribution limits at issue in both *Buckley* and *Shrink Missouri* were subjected to constitutional challenge shortly after their enactment. See *Buckley*, 424 U.S. at 6-7; *Shrink Mo.*, 120 S. Ct. at 901-902. It was therefore somewhat more feasible to expect the government in defending those laws to present evidence indicating that the abuses at which the caps were directed had actually occurred in the recent past.

the FECA contribution limits, notwithstanding the Court's assumption that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court explained that it is "difficult to isolate suspect contributions," and that "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30. Neither *Buckley* nor this Court's subsequent campaign-finance decisions suggest that the danger of corruption must be proved separately with respect to each potential category of donor.

To the contrary, the Court in *Buckley* upheld the application of the FECA contribution limits to members of a candidate's immediate family, even though it was not presented with either record evidence or legislative findings of corruption by family members. 424 U.S. at 53 n.59. The Court explained that "[a]lthough the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." *Ibid.* Similarly here, since respondent seeks a categorical exemption from spending limits that have been held valid as applied to individuals and non-party political committees, it is respondent's burden to demonstrate that unlimited party-coordinated spending will *not* create the same

potential for abuse as similar expenditures by non-party donors.[6] Respondent cannot make that showing.

1. The individuals who direct the disbursement of party funds—who are in many instances themselves Members of Congress responsible to the party's congressional leadership (see Gov't Br. 33 n.16)—have an obvious and substantial interest in the voting behavior of legislators within the party. Although the election to Congress of as many party members as possible is certainly one of the party's goals (see Resp. Br. 26-27, 34), that goal is subordinate to the party's ultimate objective of implementing a legislative program. A Member of Congress who is nominally aligned with a political party, but who regularly flouts the wishes of the party leadership, is at best an uncertain asset. There is no reason to believe that the officials charged with allocating the party's funds would be more willing than other donors to forgo efforts to utilize coordinated expenditures as a means of influencing legislative behavior. To the contrary, because party-coordinated expenditures will often be controlled by a small number of individuals who are intensely interested in the voting behavior of the party's candidate once elected or re-elected to office (see Gov't Br. 33 &

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[6] Respondent contends (Br. 30) that coordinated spending by a political party in support of its candidates should be regarded as analogous to the candidate's financial support of his own campaign, which the Court in *Buckley* held (see 424 U.S. at 51-54) could not constitutionally be limited. But if the candidate's immediate family members are treated as sufficiently distinct from the candidate to permit limitation of their coordinated expenditures, there is no reason that a different constitutional rule should apply to party officials.

n.16), the rationale of *Buckley* is directly applicable here.[7]

2. Four Justices in *Colorado I* concluded that the FECA limits on party expenditures are unconstitutional even as applied to spending that is in fact coordinated with a candidate for federal office. See Pet. App. 114a-119a (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part); *id.* at 119a-140a (Thomas, J., joined in part by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part); Gov't Br. 8. Those Justices did not suggest, however, that party committees are less likely than other donors to use coordinated spending as a means of influencing the conduct of party members once in office. Justice Kennedy's concurring and dissenting opinion took the position that political parties have a particular need to coordinate their campaign spending with their candidates and are therefore specially burdened by the FECA's limits on coordinated expenditures. See Pet. App. 114a-115a, 118a. We address that argument at pages 2-7, *supra*. The thrust of Justice Thomas's concurring and dissenting opinion was that because "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes," the party's achievement of that aim "does not * * * constitute a subversion of the political process." *Id.* at 138a

[7] The fact that some Members of Congress are able to transfer surplus campaign funds to the party (see Resp. Br. 34 & n.20) scarcely prevents the use of party-coordinated expenditures as a means of influencing legislative behavior. To the contrary, the fact that certain senior legislators may be the *source* of party funds is likely to heighten their influence over those Members of Congress who *are* supported by party-coordinated expenditures.

(internal quotation marks omitted). As we explain in our opening brief, however, although party officials have an undoubted right to seek to influence their members' voting behavior, the effort to pursue that legitimate objective through financial largesse poses special risks. Congress's decision to address those risks through reasonable limits on party-coordinated spending is constitutional. See Gov't Br. 38 & n.18.

Significantly, respondent makes no effort to defend the theory, articulated in Justice Thomas's concurring and dissenting opinion in *Colorado I*, that a political party has a constitutional right to employ coordinated expenditures as a means of influencing its members' votes. Respondent relies instead upon the quite different assertion that party officials will not utilize coordinated expenditures in that manner, even if all limits on such expenditures are eliminated. For the reasons set forth above, there is no basis for concluding that party officials are uniquely reluctant to use coordinated spending as a means of influencing legislative behavior.

3. Respondent contends that "FECA's extensive reporting and disclosure requirements," as well as the limits on contributions *to* party committees, render limits on party-coordinated expenditures unnecessary. See Resp. Br. 35, 42. Those features of the Act, however, are not unique to political parties. All political committees must publicly report a broad range of information regarding income and outlays. See 2 U.S.C. 434. With party committees, no less than other political committees, "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption." *Buckley*, 424 U.S. at 28; accord *Shrink*

Mo., 120 S. Ct. at 908 n.7. And contributions to non-party political committees are subject to the same FECA limits that apply to contributions to respondent. See 2 U.S.C. 441a(a)(1)(C) and (2)(C).[8]

D. Respondent contends (Br. 36-38, 44-45) that the FECA limits on party-coordinated expenditures cannot be sustained on an anti-corruption rationale because those limits were enacted for a different reason. Respondent principally relies (Br. 37) on the plurality's statement in *Colorado I* that "this Court's opinions

[8] Respondent also contends that party-coordinated expenditures in support of congressional candidates are unlikely to cause corruption because "a party's incumbent members of Congress * * * are unlikely to be pushed around by offers to provide or threats to withhold campaign support," while non-incumbent candidates "are not in a position to provide official favors" at the time the expenditures are made. Resp. Br. 34, 35. Like the arguments discussed in the preceding paragraph of the text, those contentions if persuasive would suggest that *all* FECA limits on contributions to candidates are unnecessary (since every potential recipient of campaign funding is either an incumbent or a non-incumbent); but they provide no basis for distinguishing party-coordinated expenditures from the coordinated spending of other donors. Cf. *Buckley*, 424 U.S. at 33 ("Since the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress had ample justification for imposing the same fundraising constraints upon both.").

There is also no merit to respondent's suggestion (Br. 46) that a more "closely drawn response [to the danger of corruption] would be to reduce the allowable size of contributions" *to* the party. That approach would effectively reduce the party's ability to engage in *independent* spending in support of its candidates for federal office. Far from being "closely drawn," a limit on contributions to the party would as a practical matter more significantly constrain the party's own communications than does Section 441a(d)'s requirement that expenditures above the statutory limit must be made independently of the candidate.

suggest that Congress wrote [Section 441a(d)] not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." Pet. App. 104a (citing *Buckley*, 424 U.S. at 57).[9] As the dissenting judge in the court of appeals recognized, however, that statement "is found in [the *Colorado I* plurality's] discussion of limits on independent party expenditures." *Id.* at 50a n.6 (Seymour, J., dissenting); cf. *Shrink Mo.*, 120 S. Ct. at 907 (explaining that *Colorado I* "did not deal with a government's burden to justify limits on contributions"; rather, "the issue in question was limits on independent expenditures by political parties"). The apparent import of the *Colorado I* plurality's assertion is that Congress's attempt to

[9] The *Colorado I* plurality also stated that "rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." Pet. App. 104a. We agree that the FECA's legislative history reveals no "*special* fear of the corruptive influence of political parties"—*i.e.*, Congress did not believe that party campaign spending creates a *greater* risk of corruption than similar spending by other political committees. Congress's "desire to enhance what was seen as an important and legitimate role for political parties in American elections" explains Congress's decision to permit party-coordinated spending in amounts far greater than the contribution limits that apply to other donors, but it provides no basis for exempting parties from all constraints on coordinated spending. Similarly, the absence of "special" reasons for concern about party expenditures supports the *Colorado I* plurality's determination that parties (like other political committees) have an unrestricted First Amendment right to engage in independent campaign spending; but it does not suggest that parties are constitutionally entitled to make unlimited *coordinated* expenditures.

limit the *independent* campaign expenditures of political parties is most plausibly understood as an effort to reduce overall campaign spending. But there is no reason to doubt that Congress's decision to restrict party-coordinated expenditures was motivated (at least in part) by the same anti-corruption rationale that generally underlies the FECA contribution limits.[10]

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[10] Contrary to respondent's suggestion (Br. 37 & n.23), Congress in 1976 focused specifically upon the spending limits applicable to political parties before amending the FECA in response to this Court's decision in *Buckley*. The Conference Report accompanying the 1976 FECA amendments explains that Section 441a(d)

> allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in subsections (a)(1) and (a)(2) of this provision.

H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976); see Gov't Br. 18-19. The Conference Report thus expressly contemplates the application of Section 441a(d) to coordinated expenditures amounting to "contributions in kind." It is surely reasonable to assume that Congress, in continuing to subject such expenditures to dollar limits (albeit limits much higher than the caps that apply to other donors), was motivated by the same considerations that generally support the FECA contribution limits.

There is also no merit to respondent's contention (Br. 36 n.22) that Section 441a(d)'s population-based formula for calculating the party-coordinated expenditure limit for Senate campaigns in each State (see Gov't Br. 3, 5-6) "belies an anticorruption motive." The statutory formula reflects Congress's recognition that the expense of campaigning is generally proportional to the number of potential voters in a particular election. The formula preserves a roughly comparable role for political parties in Senate campaigns in each State. Determining the precise level of appropriate contribution limits is a legislative judgment that does not raise meaningful constitutional concerns, see *Buckley*, 424 U.S. at 30, and Congress

Indeed, as our opening brief explains (at 27-29), Members of Congress, in debating a 1973 predecessor to the FECA, expressly advocated the imposition of limits on contributions by parties to their candidates based on an anti-corruption rationale. As our opening brief acknowledges (at 28-29 & n.13), the provisions ultimately enacted in 1974 differed in some respects from those debated the previous year. Contrary to respondent's contention (Br. 38), however, those differences in no way undermine the natural inference that Congress's retention in the enacted bill of limits on party spending reflected a continuing concern regarding potential corruption of candidates.[11]

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is not precluded from considering other policy objectives in fashioning the legislation, see *id.* at 36, 84 n.112.

[11] Respondent's reliance (Br. 38) on *Garcia* v. *United States*, 469 U.S. 70 (1984), is misplaced. The Court in *Garcia* recognized that "[t]o permit [floor] colloquies to alter the clear language of the statute undermines the intent of Congress." *Id.* at 78. The instant case, however, involves no question of statutory interpretation at all, let alone an effort "to alter the clear language of the statute." Rather, the 1973 legislative history simply reinforces what would in any event be the most normal inference—*i.e.*, that Congress's decision to limit the coordinated expenditures of political parties was motivated by roughly the same concern that has been held to support the coordinated spending limits imposed on other persons.

For the reasons stated above, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 00-191

In the
SUPREME COURT OF THE UNITED STATES

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN
FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF MISSOURI, COLORADO, HAWAII, MONTANA, NEW YORK, OKLAHOMA AND VERMONT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a political party has a First Amendment right to make unlimited campaign expenditures in coordination with the party's congressional candidates, notwithstanding the limits on such coordinated expenditures imposed by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 et seq.

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INTEREST OF AMICUS CURIAE

A "large number of states" (*Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 903 (2000) (*Shrink Missouri*)), following the lead of the Federal Election Campaign Act of 1971 (FECA) affirmed in *Buckley v. Valeo*,

424 U.S. 1 (1976), have laws restricting the ability of political committees to provide financial support (other than their own independent expenditures) to candidates for public office. A majority of those states, again following the FECA lead, include political party committees among the political committees whose support of candidates is regulated.[1] This case implicates the continuing validity of those statutes, the states' ability to modify them or to enact new campaign finance reforms, and even the states' ability to use limits on contributions made directly to candidates as tools to attack the reality or perception of corruption in state politics.

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[1] *See, e.g.*, Alaska Stat. § 15.13.070(d) (Lexis 2000); Ariz. Rev. Stat. Ann., § 16-905.D (1996); Del. Code Ann. tit. 15, § 8010(b) (1999); Fla. Stat. Ann. ch. 106.08(2) (Supp. 2000); Ga. Code Ann. §§ 21-5-41(b) (2000); Idaho Code § 67-6610A(2) (Supp. 2000); Kan. Stat. Ann. § 25-4153(d), (g) (1993); Md. Code Ann. Elec. § 13-212(a)(i)-(ii) (Supp. 2000); Mich. Comp. Laws Ann. § 169.252(3)-(4) (West Supp. 2000); Minn. Stat. Ann. § 10A.27.1 - .2 (West Supp. 2000); Mont. Code Ann. § 13-37-216(3) (1999); Nev. Rev. Stat. §§ 294A.009.3, 294A.100.1 (1999); R.I. Gen. Laws § 17-25-10.1(a), (e) (1996); S.C. Code Ann. § 8-13-1316 (Supp. 1999); Tenn. Code Ann. §§ 2-10-302, 2-10-306 (Supp. 2000); Vt. Stat. Ann. tit. 17, § 2805 (Supp. 2000); Wash. Rev. Code Ann. § 42.17.640(1), (3) (West 2000). Three states that had such statutes have repealed them: Colorado, which repealed Colo. Rev. Stat. § 1-45-104(5) (1998), though it had been upheld in *Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1095 (D. Colo. 1999); Hawaii, *see* Haw. Rev. Stat. § 11-205 (1993), § 11-205 (Supp. 1999); and California, *see* Cal. Gov't. Code § 85303 as amended by Proposition 34 (2000).

STATEMENT

There is a continuum of financial support for candidates provided by political committees, such as those organized by or affiliated with political parties.

At one end is the parties' funding of their own, independent speech. This Court addressed that end of the continuum the first time this case came to this Court. *Colorado Republican Federal Campaign Comm'n. v. Federal Election Comm'n*, 518 U.S. 604 (1996) ("*Colorado Republican I*"). There, the plurality observed that "[t]he summary judgment record indicate[d] that the expenditure in question [was] what this Court in *Buckley* called an 'independent' expenditure, not a 'coordinated' expenditure that other provisions of FECA treat as a kind of campaign 'contribution.'" *Id.* at 613. The Court held that the government had not justified depriving political parties of the right, which all others were assured by *Buckley*, to speak independently.

At the other end of the continuum lie the parties' contributions to candidates, which fund speech by candidates. The ability of the government to restrict contributions to candidates by all other types of political committees was affirmed in *Buckley v. Valeo* and *Shrink Missouri*. And the government's ability to restrict contributions by political parties to candidates has been upheld three times, in *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (Alaska 1999), *cert. denied* 120 S.Ct. 184 (2000), in *Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1095 (D. Colo. 1999),[2] and most recently in *Landell v. Sorrell*, 2000

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[2] The decision has been appealed, but the validity of the party limits is not at issue because they were subsequently repealed. *See* note 1, *supra*.

U.S. Dist. LEXIS 11606, *24 (D. Vt. Aug. 10, 2000).[3] It has been rejected once, in *Missouri Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000) (*Missouri Republican*) (petition for certiorari to be filed).

In this case, *FEC v. Colorado Republican Federal Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000) (*Colorado Republican Remand*), the Tenth Circuit does not distinguish among the range of issues that arise between the point addressed by *Colorado Republican I* and the point addressed by the party contributions cases. Its holding thus applies equally to the instance where the candidate merely learns of the party's expenditure and to the instance where the party pays for speech the candidate has chosen unilaterally. According to the Tenth Circuit, the government – absent some undefined, but yet-to-be-seen form of proof – cannot regulate the party's financial involvement in a campaign at any points.

The significance of any holding that frees political parties from restrictions on their financial support for individual candidates is demonstrated by events in Missouri as a result of the *Missouri Republican* case. That case arose from Missouri's efforts to enforce its limits on party contributions (*not* expenditures, coordinated or otherwise) in 1998. During the 1999-2000 election cycle, Missouri was enjoined from enforcing those limits, thus freeing political party committees – and *only* political party committees – to give candidates unlimited amounts of aid. Looking solely at monetary

[3] In *Landell*, however, the court struck the particular limits adopted for party contributions in Vermont (which ranged from $200 to $400) because they were too low. 2000 U.S. Dist. LEXIS 11606 at *24.

contributions,[4] the impact of that injunction was dramatic. Throughout the 1990s, the most that all political party committees in Missouri (and there are scores of such committees) combined gave to all candidates combined was $820,721 in 1997-98. But in the 1999-2000 cycle, just the Republican and Democratic State Committees contributed a total of $4,128,275 to candidates. The creation of a loophole in contribution limits for contributions by party committees thus dramatically skewed the Missouri political process.

The same occurred in North Carolina. When the legislature exempted national party committees from the state's $4,000 limit on contributions, $750,000 in soft money found its way from the Republican National Committee to the party's candidate for governor.[5]

In both instances, the flow of money through parties to candidates was the result of the elimination of a limit on party contributions, not a limit on coordinated expenditures. But by throwing out limits on party expenditures that are coordinated with candidates regardless of the degree of coordination, the Tenth Circuit's rule would create a hole of similar size and significance.

[4] Missouri separately limits "in-kind" contributions by political party committees. Mo. Rev. Stat. § 130.032.7 (Supp. 1999).

[5] *See*, "Election board can't stop soft money flow," Wilmington Star, Oct. 1, 2000, available at http://www.wilmingtonstar.com/daily/10012000/local_st/27124.htm; "Money from afar," Charlotte Observer, October 4, 2000.

INTRODUCTION

Contributors and candidates alike, serving their respective self-interests, encourage innovation. They are engaged in a constant, and too often successful search for methods of transferring money (or services that are the equivalent of money) around the boundaries set by FECA and its state counterparts. Hence we see an active national debate over regulation of now-unregulated "soft money" that is received and disbursed by national political parties. That debate has indirectly highlighted the role of state political parties: they are major recipients of the national parties' "soft money" disbursements. In a recent report on their study of party financial support for legislative candidates, two political scientists noted the large and growing role of "soft money" in state campaigns:

> The 1996 election was a watershed for "soft money" (that is, unregulated money with no limits as to who can contribute or how much can be contributed). Soft money is raised by the national party committees for purposes of party building. More specifically, soft money is used for paying a portion of state party overhead; for campaign activity that benefits federal, state, and local election (e.g., voter registration and get-out-the-vote drives); issue advocacy; and generic party advertising. The 1995-1996 election cycle saw a soft money explosion. The Democratic national party committees spent $121.8 million in nonfederal soft money, a 271 percent increase over 1992! Republicans spent $148.7 million, a 224 percent increase over 1992! For Democrats, $64.6 million of this money was transferred to state party committees

> and $4.4 million was contributed directly to state and local candidates. The Republicans transferred $50.2 million of this money to state parties and contributed $5.2 million to state and local candidates . . . .

A. Gierzynski & D. Breaux, "The Financing Role of Parties," in J. Thompson & G. Moncrief, CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS (Congressional Quarterly 1998), at 204.

"Soft money" funneled through national party committees is only one piece of the biggest wave of campaign finance innovations threatening to swamp campaign finance reform at the beginning of the new century: the use of political party committees to channel – or, to use a more pointed term, to launder – large contributions to candidates. Left unchecked, that wave will wash away the states' ability to attack the movement of large sums to candidates. The states will again find themselves in a "regime of large individual financial contributions," with its "inherent" "public awareness of the opportunities for abuse." *Buckley v. Valeo*, 424 U.S. at 27. Only in those few instances where party leaders are so inept as to leave a publicly available paper trail between contributor and candidate, or where the trail is disclosed by informants, will the states still be able to act. And even then, the available criminal or other civil penalties will necessarily be inadequate, for such penalties can never be anything more than a deterrent: they cannot be invoked until after the people have spoken at the ballot box, and do not reverse the tainted election.

The amici states thus urge the Court to reverse the decision of the Tenth Circuit in its entirety. In the alternative, the amici states urge the Court to restrict that decision to instances where the party, rather than the candidate, really does

control the expenditure – thus preserving the states' ability to restrict the movement of money directly and indirectly to the control of a candidate.

SUMMARY OF ARGUMENT

The Tenth Circuit has, for political parties, abolished the contribution/expenditure line drawn in *Buckley v. Valeo* and most recently reaffirmed in *Shrink Missouri*. Where the Tenth Circuit in *Colorado Republican I* would have eliminated the parties' ability to make independent expenditures, here it would give the parties the ability to make unlimited coordinated expenditures. And because the Tenth Circuit's holding is broad enough to cover expenditures regardless of the level of coordination – it would effectively end the regulation of financial support by political parties to candidates. Such steps are not justified by any of this Court's precedents.

The imposition of limits on coordinated expenditures is justified by two rationales recognized in *Buckley v. Valeo*: the states' compelling interest in attacking even the perception of corruption; and the need to prevent evasion of their laws that attack that perception. Political parties are no less susceptible to contributors seeking to evade contribution limits than are committees such as Shrink Missouri Government PAC. And the Tenth Circuit's decision contains neither findings nor logic to support the premise that either the reality or the perception of corruption evaporates when funds flow through party, rather than other political committees.

Perhaps there are some party expenditures where the contact between the party and the candidate is so limited that a particular expenditure in support of a particular candidate really is independent despite being made with the candidate's knowledge, and thus should not be considered a contribution.

But if so, the proper course would be to define the scope of such protected expenditures, then to remand this case to determine whether the expenditures at issue were protected. Doing so would not only defer the dramatic effect that otherwise results from the Tenth Circuit's decision, but would give the states guidance they need as they seek to eliminate the perception of corruption while complying with constitutional limits.

ARGUMENT

I. That the transaction involves a committee associated with a political party does not erase the distinction between contributions and expenditures.

The Tenth Circuit finds the continuum of methods of party financial support for campaigns to be a slippery slope. According to the Tenth Circuit, once this Court started in *Colorado Republican I* to slide at the point of independent expenditures, it was fated to continue through the entire range of coordinated expenditures.[6] In *Buckley v. Valeo*, this Court addressed a similar range of issues for expenditures and contributions by individuals and by nonparty committees. Nothing in that decision suggested a slippery slope. Instead, the Court found a clear distinction, of constitutional significance, between expenditures in all their variations and contributions in all their variations. The Court has since reaffirmed that distinction. *See Shrink Missouri*, 120 S.Ct. at 903-04. Nothing in this Court's precedents nor in the facts of this case justifies a different result solely as to committees affiliated with political parties. Certainly such a step is not required by *Colorado*

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[6] The Eighth Circuit agreed, and held in *Missouri Republican* that the slide continued on through direct financial contributions to candidates. 227 F.3d at 1071, 1073.

Republican I.

There, this Court considered independent advertising by one major political party in opposition to a declared candidate for the nomination of the other party. The FEC urged, and the Tenth Circuit agreed, that the expenditure be treated as a contribution, subject to contribution limits. This Court determined that such expenditures, even when made by a political party, may be independent, and thus protected by the *Buckley* rule. By so doing, the Court rejected the FEC's effort to restrict the protection given to "independent expenditures" in *Buckley* so narrowly as to make that tool unavailable to political party committees.

Here, the Colorado Republican Federal Campaign Committee pressed its argument, and persuaded the Tenth Circuit to act, at the other end of the expenditure-contribution continuum. But that position threatens a result parallel to what this Court refused to sanction in *Colorado Republican I*: to make unavailable to the states, as to political parties, a tool expressly authorized by this Court in *Buckley*. By giving constitutional protection to party expenditures regardless of how extensively they are coordinated with candidates, the Tenth Circuit would effectively eliminate the ability of the states to attack the appearance of corruption that is inherent in a regime of large contributions, so long as the contributions flow through political parties, and so long as the contributors, candidates, and parties are sophisticated enough to avoid creating enough of a record to make prosecution possible.

There is neither precedent nor justification for giving all party spending the constitutional protection given to independent expenditures, making political party committees essentially immune from regulation.

II. Party expenditures in support of individual candidates enable evasion of other limits on contributions and carry the perception of corruption that those limits attack.

Limits on financial assistance by committees generally, and political party committees specifically, is justified by two governmental interests: the need to prevent evasion of the individual limits this Court has upheld; and the potential for corruption or its appearance that is created by the use of committee funds to support individual candidates. With regard to the first, the Tenth Circuit's decision necessarily is based on one of two assumptions: that evasion of limits on individual and party contributions by channeling money through the parties is impossible; or that such evasion is insufficient to justify regulation. The second assumption is inconsistent with the holding in *Buckley*. And the first makes no sense.

In *Buckley*, this Court upheld a $25,000 limit on total contributions by any one individual to all committees or candidates in any one year. The Court observed that without such a limit, a person "might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. Preventing the evasion of limits on the movement of campaign funds from individuals remains a viable and important justification for limits on contributions by committees. And it applies equally well when the committees involved are those organized by or affiliated with political parties. In fact, the Tenth Circuit fails to articulate any reasonable basis for believing that evasion is less likely when funds flow through Colorado Republican Federal Campaign Committee than when they flow through the Shrink Missouri Government PAC.

The Tenth Circuit's discussion of the close connection between the parties and their candidates parallels that of the Eighth Circuit in *Missouri Republican*. *See Colorado Republican Remand*, 213 F.3d at 1227-28, *Missouri Republican*, 227 F.3d at 1072-73. But both courts focus only on the parties' speaking through candidates, neglecting the candidates' success at using the parties. That success has long begun organizationally, as candidates for major offices (president, governor, senate, etc.) ensure the election or appointment of their own allies to party positions. For example, after the governor of Missouri declared himself as a candidate for the U.S. Senate in the 2000 election, his former chief of staff became executive director of the Missouri Democratic Party. A leading candidate for Governor of Virginia is apparently naming his party's new chairman.[7] A candidate's success in using the party continues as the party acts as the candidate's surrogate, sometimes to give the candidate deniability on controversial or offensive statements or advertising, at other times to reiterate the candidate's personal message. In fact, national and state parties showed very effectively again in 2000 that they will run advertisements that either overtly or covertly support a particular candidate using funds in amounts that could not go to the candidate directly, but which were raised with the candidate's help. The implicit suggestion in the Tenth Circuit's decision that despite those connections and actions political parties are inherently so separate from candidates as to make such evasion impractical or unimportant simply makes no sense.

The possibility of evasion goes beyond "how much" can be contributed to a candidate. It goes to "from where." Some states preclude or at least limit candidates from accepting

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[7] *See* http://washingtonpost.com/wp-dyn/articles/A7214-2000Nov12.html.

contributions from corporations or labor unions.[8] That national and often state political parties *can* accept such contributions makes it possible for corporations and unions to channel funds to candidates despite the prohibitions. Again, political scientists studying the movement of funds have identified a notable example:

> North Carolina law limits individual contributions to $4,000 per election and bans corporate contributions. But take the case of Robin Hayes, the 1996 Republican nominee for governor and an heir to the Cannon Mills textile fortune. Trailing badly one month prior to the election, he paid a visit to an old friend who happened to be the vice chairman of First Union Bank. Hayes requested that the bank make a contribution to the Republican National Committee (RNC). The bank responded with contributions totaling $100,000. The same day, another North Carolina corporation gave the RNC $12,000 at the request of the Hayes campaign. Two weeks later, Hayes contributed

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[8] *See, e.g.*, Ala. Code § 10-2A-70.1 (1999); Alaska Stat. § 15.13.074(f) (2000); Ariz. Rev. Stat. Ann. § 16-919 (2000); Ky. Rev. Stat. Ann. § 121.025 (1998); Mass. Ann. Laws Ch. 55, § 8 (2000); Mich. Comp. Laws §§ 169.254, 169.255 (2000); Minn. Stat. § 211B.15 (2000); Miss. Code Ann. § 97-13-15 (2000); Mont. Code Ann. § 13-35-227 (2000); N.Y. Elec. Law § 14-116 (Consol. 2000); N.C. Gen. Stat. § 163-278.15 (2000); N.D. Cent. Code § 16.1-08.1-03.3 (2000); Ohio Rev. Code Ann. § 3599.03 (Anderson 2000); Okla. Stat. tit. 21, § 187.2 (1999); Pa. Stat. Ann. tit. 25, § 3253 (1999); S.D. Codified Laws § 12-25-2 (2000); Tenn. Code Ann. § 2-19-132 (2000); W.Va. Code § 3-8-8 (2000); Wis. Stat. § 11.38 (1999).

> $100,000; the RNC netted a total of $212,000 from Hayes' efforts. Within days, the Republican national committee sent the state GOP $213,450. That same day, the state party made a contribution of $213,450 to the Hayes campaign . . . .

J. Thompson & G. Moncrief, "Exploring the 'Lost World' of Campaign Finance," in J. Thompson, *supra*, at 4-5. Absent limits such as those at issue in this case, the only tools for preventing evasion are, again, civil and criminal penalties. But even in the seemingly obvious Hayes example, successful prosecution is improbable. With millions of dollars flowing through national committee accounts, it is unlikely that sophisticated money managers will leave a paper trail sufficient to rebut their own self-serving claims of "independent" decisions to channel party funds to support contributors' favored candidates.[9]

In addition to rejecting the idea that evasion is an ill justifying prophylactic measures, the Tenth Circuit rejects the idea that the public perceives corruption when large sums that

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[9] Again, the Hayes incident in North Carolina is instructive. Contemporaneous articles quoted RNC officials as denying that corporate money ever flowed to North Carolina. J. Morrill, "Soft money mocks limits on campaign contributions," Charlotte Observer, June 1, 1997, p. 6A, col. 3. But as an attorney for the North Carolina Democratic Party was reported as saying about his own party, "the [National Committee] sends donations from North Carolina corporations to one of many states that accept them. Individual soft money from those states ends up in North Carolina." *Id.* The Republican Party apparently took that approach this year. *See* articles cited in note 5, *supra*.

flow to political parties are used to support individual candidates. To put it in the context of the North Carolina example cited above, the Tenth Circuit implicitly concludes that the public would not (or perhaps just could not reasonably) perceive corruption if the corporate checks, though used to support Hayes, remained in the party's hands. Such a conclusion finds no support in the Tenth Circuit's logic or its citations to the record before it. And such a conclusion is not logical, reasonable, or consistent with longstanding public views of the role of party financiers.

Though we may now be far removed from the days of the Pendergasts or Tammany Hall, the connection between parties and undue influence has not disappeared – either in reality or in the public mind. The machine politics of the last century have been replaced by other, more sophisticated and less sinister approaches, but they, too, tie candidates to big party contributors. Perhaps the most obvious is the use, by parties, of candidates and public officials as fundraising attractions. Such use takes many forms, ranging from the mere announcement of an official as a "sponsor" for a single event, to a "club," whose members are entitled to mingle with – and privately express their views to – candidates and officials on a regularly scheduled basis. Those events play a role in creating the "growing public dissatisfaction with campaign finance" that is based on the assumption that when PACs and lobbyists pay campaign costs, "there is some quid pro quo expected in return." J. Thompson, *supra*. at 5. What contributors to the parties – like contributors directly to candidates – label "'access' . . . is more likely to be perceived by the public as 'undue influence.'" *Id*. at 6. There is nothing in the Tenth Circuit's decision to alleviate the public's concern that "undue influence" can be obtained as effectively by paying the party for the privilege of sitting at breakfast with a candidate as by paying the candidate directly.

III. That some party expenditures in support of, but not actually handed to candidates might be outside the realm of constitutional regulation does not justify the Tenth Circuit's broad holding.

Under the Tenth Circuit's analysis, a political party's right to make unlimited "coordinated expenditures" permits it to do anything from placing its own advertisement supporting a candidate after merely notifying the candidate, to paying a bill the candidate has already incurred. Certainly as to both of the concerns addressed above – evasion and the perception of corruption – there is a significant difference between those points on the continuum. Yet the Tenth Circuit's decision makes no distinction. This Court should not endorse that broad-brush approach.

That is particularly true when the Court's holding will immediately affect not just the federal statute at issue here, but also state statutes that extend beyond the extremely narrow realm to which the Tenth Circuit would relegate this Court's affirmance of limits on contributions. Just how it will affect state statutes will depend in part on the precise manner in which each state law addresses expenditures that fit within the Tenth Circuit's broad use of "coordinated." Only one state expressly does what the FEC urges here: defines any party spending in support of a particular candidate as a "contribution," subject to its limits.[10] Some states have not specifically addressed the

[10] S.C. Code Ann. § 8-13-1300(17) (Supp. 1999) (unregulated "independent expenditures" exclude those "made to, controlled by, coordinated with, requested by, or made in consultation with a candidate," but all party expenditures in support of a candidate are considered to be "controlled by" the candidate, and thus are subject to the state's contribution limits).

issue of "coordinated" expenditures, but have broad definitions of "contribution" that cover at least some party expenditures.[11] Others have more specific language, defining party expenditures as contributions when they are made "in cooperation, consultation, or in concert with, or at least at the request or suggestion of, a candidate."[12] That language may appear not in the definition of "contribution" itself, but in a separate definition of "independent expenditures," ones that are excluded from the definition of and limitation on

[11] *E.g.*, Del. Code Ann. tit. 15, § 8002(6) (1999) (contribution includes any expenditure made for the benefit of any candidate, except independent expenditures); Fla. Stat. Ann. ch. 106.11(3)(a) (Supp. 2000) (contribution includes any "payment. . . including contributions in kind having attributable monetary value in any form, made for the purpose of influencing the results of an election"); Ga. Code Ann. § 21-5-3(6) (2000) (similar); Idaho Code § 67-6602(c) (Supp. 2000) (contribution includes the transfer of anything of value); Kan. Stat. Ann. § 25-4143(d) (1993) (same); Mich. Comp. Laws Ann. § 169.204 (West Supp. 2000) (similar); Nev. Rev. Stat. §§ 294A.007 (1999) (similar); R.I. Gen. Laws § 17-25-3(3) (1996) (similar); Tenn. Code Ann. § 2-10-102(3) (Supp. 2000) (similar); Vt. Stat. Ann. tit. 17, § 2801(2) (Supp. 2000) (similar). Such definitions might be limited by rule or policy, however. For example, the Missouri Ethics Commission has formally interpreted the Missouri law, Mo. Rev. Stat. Ann. § 130.011(12) (Supp. 1999), to define "contribution" to include only spending that is "requested to be made by, directed or controlled by, or made in cooperation with, or made with the express or implied consent of the candidate." Missouri Ethics Commission Opinion No. 96.06.135 (July 1996).

[12] Wash. Rev. Code Ann. § 42.17.020(14)(a)(ii) (West 2000).

"contributions" in a legislative attempt to give definition to this Court's holding in *Buckley v. Valeo*.[13]

None of the published opinions in this case cite any evidence for the proposition that the party spending addressed by the FEC was made "in cooperation, consultation, or in concert with, or at least at the request or suggestion of, a candidate." The facts cited by the court of appeals and the district court may not even justify a holding that party expenditures at the "mere notification" point on the continuum are entitled to *Buckley*'s "expenditure" protections. But to restrict the Tenth Circuit holding to that point would prevent its being used to interfere in states that have taken a position less aggressive than that of the FEC. And it would give states more guidance as they seek to confine their attacks on the appearance of corruption within the bounds allowed by the Constitution.

On the other hand, to fully endorse the Tenth Circuit's holding would cast doubt on, even state laws that address only those party expenditures at the other end of the continuum, *i.e.*, where the level of coordination makes them the undisputed equivalent of a candidate's own spending. In fact, as shown by the Eighth Circuit's holding in *Missouri Republican*, the Tenth Circuit's rule can easily be applied to prevent states from regulating even the movement of money directly to candidates. Affirming the Tenth Circuit's holding would thus make evasion and the perception of corruption the rule, rather than the exception.

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[13] *E.g.*, Ariz. Rev. Stat. Ann. § 16-901.11 (1996); Fla. Stat. Ann. ch. 106.011(5)(a) (Supp. 2000); Idaho Code § 67-6602(g) (Supp. 2000); Minn. Stat. Ann. 10A.01.4, .11, and .13 (West Supp. 2000).

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the Tenth Circuit.

Respectfully submitted,

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IN THE

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FEDERAL ELECTION COMMISSION,

Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF THE *AMICI CURIAE*

Amici are political scientists, many of whom have experience in, and all of whom are students of, the political process. *Amici* submit this brief *amicus curiae* in support of Petitioners.[1] *Amici* have dedicated all or a substantial part of their careers to studying, analyzing and discussing the history of and trends in the political system in the United States. As a result, *amici* have considerable knowledge of campaign financing practices and the effects of various practices on the electoral process. *Amici* thus have reasoned opinions on the issues in this case and all share an interest in bringing their views before this Court.

In particular, the *Amici* are: Paul Allen Beck, Professor and Chair (Department of Political Science), Ohio State University, former Program Chair of the American Political Science Association, whose writings include *Party Politics in America* (8th ed. 1997); Janet M. Box-Steffensmeier, Associate Professor, Ohio State University, whose writings include *The Role of War Chests in Campaign Strategy*, Am. J. Pol. Sci. 40 (1996); Leon D. Epstein, Hilldale Professor of Political Science Emeritus, University of Wisconsin-Madison, former President of the American Political Science Association, whose writings include *Political Parties in the American Mold* (1986); Anthony Gierzynski, Associate Professor, University of Vermont, whose writings include, *Money Rules: Financing Elections in America* (2000); Donald P. Green, Professor of Political Science and Director of the Institution for Social and Policy Studies, Yale University, whose writings include *The Dynamics of Campaign Spending*

1. The parties have consented to the submission of this brief. Their letters are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel.

in U.S. House Elections, 56 J. Pol. 459 (1994) (co-authored with Jonathan S. Krasno & Jonathan A. Cowden); Paul S. Herrnson, Professor of Government and Politics and Director of the Center for American Politics and Citizenship, University of Maryland, whose writings include *Congressional Elections: Campaigning at Home and In Washington* (3d ed. 2000); Ruth S. Jones, Professor, Arizona State University, whose writings include *A Decade of U.S. State-Level Campaign Finance Reform, in Comparative Political Finance Among the Democracies* 57 (Herbert E. Alexander & Rei Shiratori, eds., 1994); Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University, whose writings include *The Politics of Power: A Critical Introduction to American Government* (rev. 3d ed. 1987); Bruce Larson, Assistant Professor, Fairleigh Dickinson University, whose writings include *The Futile Quest for the Ideal Congressional Campaign Finance System, in American Politics: Core Argument, Current Controversy*, (Peter J. Woolley & Albert R. Papa, eds. 2000); David B. Magleby, Distinguished Professor of Political Science, Brigham Young University, whose writings include *Outside Money: Soft Money and Issue Advocacy in the 1998 Congressional Elections* (2000); Thomas E. Mann, W. Averell Harriman Senior Fellow in American Governance, The Brookings Institution, whose writings include *Campaign Finance Reform: A Sourcebook* (1997) (co-edited with A. Corrado, D. Ortiz, T. Potter and Frank J. Sorauf); David Schultz, Professor, Hamline University, Law Professor, University of Minnesota, whose writings include *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Texas Rev. of Litig. 86 (1998); Daniel M. Shea, Associate Professor, Allegheny College, whose writings include *Transforming Democracy: Legislative Campaign Committees & Political Parties* (1995); and Frank J. Sorauf, Regents' Professor Emeritus of Political Science, University of Minnesota, former President of the Midwest Political Science Association, whose writings include *Inside Campaign Finance: Myths and Realities* (1992).

Introductory Remarks

We are a diverse group of political scientists who agree with the view expressed by the Court of Appeals that political parties play a vital role in the American system of government. Political parties are integral parts of our nation's political life, and strong political parties are good for America. But we do not support the majority opinion's view below that the current Congressional limits on political party coordinated expenditures are inconsistent with or a hindrance to strong political parties.

As a policy matter, most of us would support a Congressional decision to raise "hard money" limits on candidate and political party contributions in exchange for placing severe limits on or banning "soft money." Regardless of our individual policy views on the question of proper contribution and spending limits, there are two matters upon which we all agree. First, in the current environment, where political parties are awash in large amounts of both hard and soft money, allowing unlimited spending by political parties in coordination with their candidates could, at a minimum, increase the public's perception that the political process is being corrupted in favor of the interests of wealthy donors. Second, the decision concerning whether to end the limits on party coordinated spending is one that is best left to Congress, which may choose to tackle this difficult policy question in the context of more comprehensive campaign finance reform.

The Court of Appeals decision, which comes to opposite conclusions, makes two fundamental errors. The Court appears to have assumed that the current limits on coordinated party expenditures have, in fact, somehow hampered the ability of political parties to be vibrant participants in federal electoral contests. However, the two major political parties and their legislative campaign committees (LCCs) are among the most important players

in our electoral landscape. In addition, the Court incorrectly assumes that political parties dilute the influence of large contributors and act as a cleansing mechanism that removes the taint of possible corruption on the money that flows through the political parties from contributors to candidates and officeholders. In reality, however, the political parties and their LCCs go to great lengths to maintain and build relationships between large donors and party candidates and officeholders. The LCCs in particular are not driven by ideology, but instead are service vehicles intended to enhance the electoral prospects of their members. Large contributions made to and coordinated expenditures made by political parties and LCCs give rise to an appearance of corruption and serve to undermine the other Federal Election Campaign Act ("FECA") contribution limits.

I. The Limits on Coordinated Party Expenditures Have Not Hampered the Ability of Political Parties and Their Legislative Campaign Committees to Be Important Players in Federal Elections.

In *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*"Colorado Republican I"*), this Court held that political parties are permitted to make unlimited hard money independent expenditures in federal political campaigns. The Colorado Republican Federal Campaign Committee argued, and this Court agreed, that political parties should be no worse off than other advocacy groups and independent spenders, who are permitted to engage in unlimited federal political expenditures as long as those expenditures are not coordinated with individual candidates.[2]

2. As political scientists, we are quite skeptical of the view that there is any significant amount of political party activity that should be deemed to be "independent" of the party's candidate. In reality, the political parties and their candidates work together, as they should, throughout a political campaign. Indeed, as the lawyer (Cont'd)

The question presented in this case, however, goes well beyond the premise of *Colorado Republican I*. In regard to coordinated expenditures and direct contributions, the limits established by Congress under FECA discriminate *in favor* of political parties. The Colorado Republican Federal Campaign Committee and all other similar political party committees are permitted to make contributions and coordinated expenditures well in excess of those permitted for other multi-candidate political committees. Thus, the claim in this case is not that the Colorado Republican Federal Campaign Committee is being discriminated against under FECA, but instead that its privileged position is not privileged enough.

Congress' decision to allow the political parties to have higher coordinated spending limits than all other actors in the political arena is a policy judgment with which most political scientists would agree. But Congress' failure to go all the way, and to provide absolutely unlimited party coordinated spending, is not evidence of Congressional hostility towards political parties. Indeed, there is little evidence to suggest that the coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights to support their candidates. *See Nixon v. Shrink Missouri Gov't PAC*,

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representing the Colorado Republicans was quoted in a recent *New York Times* interview, "the state of the law [is] 'bizarre' because 'everyone in the country knows that political parties and their candidates work together all the time.' " Linda Greenhouse, *Court Agrees to Review Restrictions on Spending*, The New York Times, Oct. 11, 2000, at A20. Prior to *Colorado Republican I*, it was generally assumed that party spending was invariably coordinated with candidates. *See* F. Christopher Arterton, *Political Money & Party Strength, in The Future of American Political Parties: The Challenge of Governance* 116 (Joel Fleishman, ed., 1982); Kirk Nahra, *Political Parties & Campaign Finance Laws*, 56 Fordham L. Rev. 53, 97 (1987).

528 U.S. 377, 120 S. Ct. 897, 908-09 (2000) ("[A]s in *Buckley*, '[t]here is no indication . . . that the contribution limitations imposed by the [law] would have any dramatic[ally] adverse effect on the funding of campaigns and political associations,' and thus no showing that 'the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). In reality, political parties are dominant players, second only to the candidates themselves, in federal elections.

In the 1977-78 election cycle, the national, state and local Democratic party committees spent $26.9 million in hard money. *See* FEC Reports on Political Party Activity, <http://www.fec.gov/press/ptyye98.htm>. By 1997-98, the last election cycle for which complete data are currently available, the Democratic Party reported spending $155.3 in hard money, an almost six-fold increase. *See id.* The 1997-98 Democratic party committee spending figures represented an 18 percent increase when compared to the previous mid-term election cycle of 1993-94. *See id.* Similarly, in the 1977-78 election cycle, the Republican party committees spent $85.9 million in hard money. *See id.* By 1997-98, the Republican committees had increased their hard money spending to $275.9 million, which represented a 19 percent increase from 1993-94. *See id.* Of course, soft money fundraising and spending by the national, state and local party committees has exploded even more.[3]

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3. Between January 1, 1999, and October 18, 2000, the three Democratic party committees took in $199.0 million in soft money. *See* FEC, 1999-2000 Non-Federal Accounts of National Party Committees, <http://www.fec.gov/press/demsft00.htm>. During that same period, the three Republican party committees took in $210.7 million in soft money. *See id.*, <http://www.fec.gov/press/repsft00.htm>.

The national, state and local Democratic and Republican party committees are not in danger of having their First Amendment rights to communicate with the public and support their candidates squelched. The $431.2 million in hard money spent by the Democratic and Republican party committees on the 1998 Congressional elections was surpassed only by the $740.4 million spent by the combined 2,100 Congressional candidates themselves. *See* FEC Reports on Congressional Fundraising for 1997-98, <http://fec.gov/press/canye98.htm>. Political action committees spent a total of $169 million on the 1998 Congressional races. *See id.; see also* Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 Colum. L. Rev. 598, 602 (2000) (party money accounts for nearly half of all campaign money raised at the national level).

A recent study of all television political advertising during the 2000 election cycle further demonstrates that political parties have not been hampered from exercising their First Amendment right to support their Congressional candidates. Between June 1, 2000, and Election Day, the political parties spent approximately $39.5 million on television ads supporting or opposing candidates in House races. *See* Buyingtime.org: An Interactive Database of Political Ads (Brennan Center), <http://www.buyingtime.org>. In those same races, the candidates themselves spent approximately $75.1 million on their own ads, and other interest groups spent approximately $29.8 million on ads. *See id.* Thus, it is clear that parties were in no danger of being marginalized in House races in 2000.

Party committees similarly outspent all other groups (except candidates themselves) on television advertising in competitive Senate races. In the closely contested Senate races in Michigan, New York and Virginia, where candidates spent approximately $100.2 million on television ads, the parties spent approximately $36.3 million on ads supporting

or opposing particular candidates between June 1, 2000, and Election Day. *See id.* Interest groups spent dramatically less than the parties, just slightly more than $10 million on those same races over the same period of time. *See id.* In sum, parties are not in danger of being unable to match the power of independent groups or unable to exercise their First Amendment right to support their candidates under current law. Wholly apart from their "on the ground" strength in get-out-the-vote activities and direct mail, parties vastly outspent groups on television advertising.[4]

Thus, it is not at all clear that the Colorado Republican Federal Campaign Committee has identified any significant burden on its First Amendment rights. Unlike the situation addressed by this Court in *Colorado Republican I* involving independent expenditures, the political parties are not currently disadvantaged *vis-à-vis* the other relevant political actors. The political parties have been given preferred status in the area of coordinated spending. The coordinated spending limits enacted by Congress have not in fact limited political parties from being robust, vital, and privileged actors in federal elections. In sum, the coordinated party expenditure limits adopted by Congress are not inconsistent with strong political parties, and the question of the appropriate level of coordinated party spending, like the question of setting an appropriate direct contribution limit,[5] is a policy judgment

4. The 1998 federal election cycle saw similar results. A total of $177 million was spent in 1998 on television advertising by all political actors, of which 79 percent was spent by candidates, 15 percent was spent by parties, and 6 percent was spent by interest groups. J. Krasno & D. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center 2000) at 34 (Table 2.3). The parties spent $25.7 million on coordinated ads and "issue ads" that supported or opposed particular federal candidates. *See id.* Outside groups spent $10.8 million on independent expenditures and issue ads. *See id.*

5. FECA quite properly treats spending coordinated with a candidate as a contribution to the candidate. *See* 2 U.S.C. (Cont'd)

that is best left to Congress. *See Shrink Missouri*, 120 S. Ct. at 913 (Breyer, J., concurring) ("[T]he legislature understands the problem — the threat to electoral integrity, the need for democratization — better than do we."); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

II. Removing the Limits Devised by Congress on Coordinated Party Expenditures Would Undermine the Integrity of Other Contribution Limits and Further Restrict Congress' Ability to Promulgate a Reasonable Campaign Finance Regime.

The Federal Election Commission noted three ways in which allowing unlimited spending by political parties in coordination with their candidates would contribute to the corruption and appearance of corruption against which FECA attempts to guard. First, the FEC asserted that the coordinated spending limits serve to prevent the evasion of the individual spending limits. Second, the FEC pointed to the corruption of the political process that results when large contributors gain influence over the political parties. Third, the FEC noted that individual political party officials can exercise their control over coordinated party spending to their own advantage. Although the Court of Appeals dismissed each of these asserted interests, each has significant factual and logical support.

A. Unlimited Political Party Coordinated Spending Could Lead to Greater Evasion of Other FECA Contribution Limits.

The FEC argued that unlimited political party coordinated spending could contribute to evasion of the other

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§ 441a(a)(7)(B)(i); *FEC v. National Conser. Political Action Comm.*, 470 U.S. 480, 492 (1985).

FECA contribution limits. Current political party fundraising practices, most notably use of the tally system and joint fundraising committees, which are described below, have already led to some evasion of the individual and PAC contribution limits. However, eliminating the coordinated party expenditure limit altogether would increase this type of evasion. Indeed, eliminating the coordinated party expenditure limit would result in the virtual repeal of the existing $1,000 limit on individual contributions to candidates.

It is certainly true, as the Colorado Republican Federal Campaign Committee asserts, that *some* of the "cleanest" money in federal elections comes through the political parties. The political parties have a large base of donors who regularly contribute small sums of money — $25, $50 or $100 contributions — for solely ideological purposes and with no expectation of any reward. The parties can aggregate these small sums of money and use them for coordinated expenditures throughout the country. The contribution limits in place on hard money under the FECA have partially transformed the parties' historic dependence on large contributors to the present development of a mass bass of small contributors. *See* Leon Epstein, *Political Parties in the American Mold* 276-78 (1986).

However, both political parties continue to obtain a substantial portion of their total contributions from large donations. In 1996, 86 percent of the hard money contributions from individuals in excess of $200 to the DNC consisted of gifts of $1,000 or more. Robert Biersack & Melanie Haskell, *Spitting on the Umpire: Political Parties, the Federal Election Campaign Act, and the 1996 Campaigns, in Financing the 1996 Elections*, 155, 160 (John C. Green ed. 1999). The figure for the RNC was 52 percent of similar contributions. *See id.* Although some individuals contribute large sums to political parties for purely ideological and disinterested reasons, many of these

individuals, especially those who "max out" on their contribution limits, contribute for the access that their money provides.[6] (Hickmott Decl. ¶ 46; Wirth Decl. ¶¶ 14-16). Indeed, the political parties structure their donor programs in a way that emphasizes the different levels of access that donors will receive, based on the level of their contributions. For example, the DNC provided membership in its Business Roundtable for $5,000 hard money contributors, to the Leadership Circle for $15,000 hard money donors, and the Majority Trust for $20,000 hard money contributors. (Hickmott Decl. ¶ 34; *see also id.* ¶ 39 ("The larger the contribution, the smaller and more exclusive the group of people who attended the get togethers with the Senators.")). The Republican Party has similar graduated donor programs.[7]

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6. According to a survey funded by the Joyce Foundation, more than 60 percent of the individuals who contributed at least $200 to a House candidate in 1996 had contact with at least one House member and over 50 percent had contact with two or more. Almost 80 percent of those who contributed at least $200 to a Senate candidate had contact with at least one senator and over 50 percent had contact with two or more. *See* John C. Green, Paul S. Hernson, Lynda Powell, Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative, and Reform-Minded* (Joyce Foundation 1998). Ordinary voters do not have this level of access to members of Congress.

7. The record below contained evidence that membership in "the House Council," was available to individuals and PACs who contributed $5,000 annually and corporations who contributed $10,000 annually to the Republican Party. Benefits for House Council members included "[r]egular briefings with key Republican Members and staff who work directly on the discussion topic." Membership in "the Congressional Forum" was available to individuals and PACs who contributed $15,000 annually, and for corporations that contributed $20,000 annually. Benefits of membership in the Congressional Forum included "[m]onthly private dinners with the Chairmen and Republican Members of key Congressional Committees" and a "[p]rivate dinner with Speaker Newt Gingrich and the GOP House leadership."

The potential for corruption and evasion of the otherwise applicable FECA contribution limits arises from the fact that political parties and the LCCs rely on their candidates, often incumbent officeholders, to raise their large dollar contributions. (Hickmott Decl. ¶ 34). The candidates do not raise this money for their parties and the LCCs for solely altruistic reasons; rather, they raise this money with an expectation that the parties will spend the money to advance the candidates' own individual electoral success. (Wirth Decl. ¶¶ 5, 8). At least one of the Senate party committees, the Democratic Senatorial Campaign Committee ("DSCC"), has long utilized a system in which the money raised by candidates and incumbent office-holders is tallied to the account of the fundraiser for purposes of determining how the committee's coordinated expenditures will be made. (Hickmott Decl. ¶ 6).

In an attempt to avoid the "earmarking" provisions of the law, the DSCC does not give its candidates a firm assurance that the funds they raise will necessarily be spent on their individual races. But in practice, money is raised by candidates with the expectation that, unless their race is an uncompetitive one, the money they raise will be available to them when they need it.[8] (Hickmott Decl ¶¶ 8, 13, 19, 22). In apparent approval of the tally system, the FEC in 1995

8. Former Senator Paul Simon described the tally system as follows:

> If this were a DSCC event, the money raised would be credited to Senate candidates based on the DSCC's tally system. Donors would be told the money they contributed could be credited to any Senate candidate. The callers would make clear that this was not a direct contribution, but it was fairly close to direct. So contributors would have the sense that this would benefit my campaign, if they contributed to the party.

Mariani v. United States, 80 F. Supp. 2d 352, 390 (M.D. Pa. 1999), *certified question answered by*, 212 F.3d 761 (3d Cir. 2000) (en banc).

entered into a conciliation agreement with the DSCC, which required the DSCC and its candidates to be a bit less explicit with donors about the link between contributions raised by candidates and spending by the DSCC. *See In re Democratic Senatorial Campaign Committee*, FEC Matter Under Review 3620 (Aug. 16, 1995).

The latest wrinkle on the tally system, which came into widespread use in the 2000 election cycle, is the joint fundraising committee. A joint fundraising committee is a vehicle under which two political committees act together to create a new political committee to act as their fundraising representative. In virtually all of the close Senate races this year, the candidates from one or both of the two major political parties created joint fundraising committees with their respective political parties.[9] The joint fundraising committees were established with allocation agreements that were typically structured so that all contributions from individuals would first go into the hard money account of the candidate's principal campaign committee, then into the LCC's hard money account, and finally into the party's soft money account once a donor is "maxed out" on hard money contributions. These joint fundraising committees are the most explicit vehicles existing today for evading FECA's otherwise applicable hard money contribution limits.[10]

9. For example, in Pennsylvania, Rick Santorum set up the "Santorum Victory Committee," while Ron Klink established "Pennsylvania Senate 2000." In Missouri, John Ashcroft set up the "Ashcroft Victory Committee," while the late Mel Carnahan established "Missouri 2000." In Florida, Bill McCollum set up the "McCollum Victory Committee," while Bill Nelson established "Florida 2000." These were all joint fundraising committees that were in addition to the candidates' principal campaign committees.

10. Although there would appear to be a significant argument that these joint fundraising committees are, on their face, a violation of FECA's earmarking prohibitions, to date there have been no publicly-disclosed enforcement actions taken by the FEC against (Cont'd)

For example, the "New York Senate 2000 Committee" was a joint fundraising committee authorized by the DSCC and the Hillary Rodham Clinton for U.S. Senate Exploratory Committee. The New York Senate 2000 Committee solicited contributions of unlimited size from individuals and PACs. Individuals were informed that the first $2,000 of their contribution would be credited to the candidate's principal campaign committee, representing the maximum $1,000 hard money contribution for the primary plus the maximum $1,000 for the general election. The next $20,000 would go to the Democratic Senatorial Campaign Committee's hard money account, and would be "tallied to Hillary Rodham Clinton." Amounts in excess of $22,000 were allocated to the DSCC's soft money account and "credited to the State of New York." Although the solicitation form, in compliance with FEC guidelines, contained a disclaimer stating that "[t]he DSCC does not accept contributions earmarked for a particular candidate," and that "[c]ontributions tallied for a particular candidate will be spent for DSCC activities and programs as the committee determines within its sole discretion," one suspects that contributors to the New York Senate 2000 Committee expected their contributions to be used to assist Hillary Rodham Clinton in her Senate campaign.[11] Thus, an individual donor who wanted to contribute $50,000 to support Hillary Rodham Clinton's election to the Senate could write a single check to the New York Senate 2000 Committee and that amount would be credited to her campaign committee and tallied in the DSCC's records to Hillary Rodham Clinton's account and the committee's New York State

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any of these committees. We report these developments to the Court not because we believe them to be legal, but instead because we know them to exist.

11. The disclaimer language was required by the FEC under the terms of the conciliation agreement reached with the DSCC in 1995. *See In re Democratic Senatorial Campaign Committee*, FEC Matter Under Review 3620 (Aug. 16, 1995).

account.[12] *See* Invitation from "New York Senate 2000" committee to fundraiser for Hillary Clinton on Nov. 5, 1999, in Beverly Hills, CA (on file at Brennan Center).

It is clear that the spirit, if not the letter, of FECA's $1,000 contribution limit from individuals to candidates is being violated by the tally system and these joint fundraising committees. *See* Sergio Bustos, *Legal Questions Abound in Campaign Soft Money Controversy,* Gannett News Service, Apr. 7, 2000, *available at* 2000 WL 4397348. Under present law, however, there is at least some limit to this evasion. Since the party committees have a coordinated spending limit for each contest, an individual candidate's primary interest is in raising enough money for the party to "guarantee" that it will spend its full allocation in the candidate's own race. (Billings Decl. ¶¶ 7, 10). Once the candidate has ensured that he has raised his quota for the Party, his incentive to continue raising additional hard money in evasion of the $1,000 contribution limits is greatly diminished. If all coordinated expenditure limits were removed, however, one would naturally expect candidates to attempt to raise even larger amounts of money from their "maxed out" donors. The current coordinated spending limits are at least a partial bulwark against this type of evasion of the FECA contribution limits.

Just last term, this Court affirmed the constitutionality of individual contribution limits in the range of FECA's $1,000 cap. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897 (2000). Despite the fact that Congress has the power to set contribution limits at this level, it may well determine that higher individual contribution limits, coupled with the elimination of soft money, is the best compromise for reducing corruption and the appearance of corruption in federal elections. However, eliminating the

12. As previously noted, there is nothing unique about the above-described joint fundraising committee, as similar ones were utilized by most of the Senate candidates in close races this year.

political party coordinated spending limits now would result in a *de facto* elimination of contribution limits from party committees to candidates and, in turn, place a premium on the value of contributions from individuals and organizations to party committees. With unlimited party coordinated spending, private donors could evade the strict limits on contributions to candidates from individuals and organizations by routing their money through the party committees. Not only does this mean that in the case of individuals, for example, the $1,000 limit on hard money contributions to a federal candidate would be raised twenty-fold, but the party could amass these contributions from any number of individuals and distribute these funds *in toto* to specific candidates, with no reasonable limits. Under this scenario, large party donors need not be indirect contributors — that is, giving money to party committees for the purpose of touting general party ideology through party-building and voter-mobilizing activities. Rather, large party donors could routinely see the sum of their hard-money donations going into the coffers of individual candidates and officeholders. It is precisely this danger — the danger of eroding the integrity of FECA's contribution limits — that led this Court to uphold the limits on donations from corporations and unions to their PACs. *See California Medical Assn. v. FEC*, 453 U.S. 180, 199 (1981) (plurality opinion) (noting that challenged provision "is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*.").

Congress did not intend to enact a series of contribution limits that could be so easily evaded. Certainly the public's perception of corruption in our system for funding federal political campaigns would not benefit from a system that allows for such wholesale evasion of the currently-existing $1,000 contribution limits. In order to command public respect, the campaign finance system must have a set of

contribution limits that are enforceable, not a set of limits that are designed to be evaded.

While earmarking contributions to party committees for specific candidates is prohibited by law, the close and personal relationships between large donors, party officials and select government leaders frequently leaves little doubt as to the sources and intended beneficiaries of large contributions. With such conspicuous practices as the "tally system" and joint fundraising agreements, any undermining of the coordinated party expenditure limits would further damage public confidence that government is not for sale.

B. Large Donors Can Corrupt Political Parties, and the Court of Appeals Ignores Reality When It Disregards the Existence of Soft Money Abuses and Their Influence on Party Hard Money Spending.

The Tenth Circuit decision takes the position that because political parties and their candidates share common interests, it is almost nonsensical to claim that political parties can "corrupt" their members. *See Colorado Republican II*, 213 F.3d at 1231. However, because corruption goes beyond *quid pro quo* bribery and includes "the broader threat from politicians too compliant with the wishes of large contributors," *Shrink Missouri*, 120 S. Ct. at 905, it is beyond reasonable dispute that political parties can and do corrupt their members. Political parties and their LCCs are conduits for wealthy contributors who are seeking to gain access and influence over the legislative process. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 666 (2000). Allowing unlimited political party contributions to candidates would enhance the potential for this type of corruption.

In order to believe that political parties function as a non-corruptible source of campaign funding, one would have to believe that passing a contribution through a political party

somehow severs or weakens the link between the original donor and the ultimate candidate recipient. However, the reality is that political parties go to great lengths to ensure that this link is not severed. While it is doubtless true that some donors to political parties give large contributions for purely ideological or other selfless reasons, it is likewise clear that many large donors contribute to political parties because of the access it provides and the opportunity to attempt to win particular legislative favors. *See* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (1990); Anne Bedlington, *Loopholes & Abuses, in Money, Elections & Democracy* 69 (Margaret Nuget, John Johannes, eds., 1990); Kenneth Levit, *Campaign Finance Reform & the Returns of Buckley v. Valeo*, 103 Yale L.J. 469, 473 (1993). The parties promote these opportunities through a number of special donor clubs and programs that explicitly promise different levels of access to members of Congress depending on the amount the donor is willing to contribute. The parties do not sever the link between donors and candidates, they institutionalize the links and set up standard rates.

Moreover, the political parties themselves go to great lengths to foster the perception with the public that political contributions to the parties corrupt the institutions of government. The Republican Party regularly charges the Democrats with being in the pocket of trial lawyers and union bosses. The Democratic Party regularly charges the Republicans with being beholden to tobacco and big oil interests. Each party scrutinizes the other party's donor lists and raises highly charged questions about the opportunities for improper influence. These well publicized critiques of the political parties by their rivals are intended to convince the public, and do convince the public, that contributions to political parties can corrupt members of Congress and the parties.

The Tenth Circuit majority opinion attempts to downplay the FEC's evidence of corruption by suggesting that the problems surrounding corruption of political parties is primarily a problem of large and unlimited soft money donations. That contention is false for two reasons. First, the problems of undue influence are not limited to large soft money donations. Wealthy individuals seeking to curry favor with Congress often find it much more effective to give $15,000 to a political party or LCC than to give multiple $1,000 contributions to individual legislators. (Hickmott Decl ¶ 47). Second, the majority opinion simply ignores reality when it disregards the fact that political parties, through various methods, use soft money contributions to fund coordinated expenditures.

The political parties are currently collecting not only hard money contributions from individuals and PACS, but also large and virtually unregulated soft money contributions from individuals, corporations and labor unions. Even though soft money and hard money are, under FECA, supposed to be kept in separate accounts, and soft money is not supposed to be used for the purposes of influencing federal elections, the reality is quite different.[13] Money is a fungible

13. This Court was undoubtedly correct when, in *Colorado Republican I*, it stated that "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute." 518 U.S. at 616. Despite this clear statement of the law and its intent, soft money is regularly used for activities that influence federal elections, most notably through the use of sham "issue ads" that are, as a practical matter, indistinguishable from a candidate's own campaign ads. To date, the FEC has not taken enforcement action against the political parties' issue ad abuses, although at least one challenge to this inaction is currently pending in court. *See* Statement of Reasons, FEC Commissioner Scott E. Thomas, *In re The Clinton/Gore '96 Primary Committee, Inc.*, FEC Matter Under Review 4713 at n.13 (May 25, 2000), *available at* <http://www.bna.com/moneyandpolitics/clinton.htm>.

commodity, and the political parties are laundering their soft money through state party committees and creating hard money in exchange.[14]

The Democratic National Committee ("DNC") purchases hard money from its state party committees by exchanging soft money, plus a 10 to 15 percent premium. *The Washington Post* was able to use state and federal government sources to trace 12 such Democratic Party hard money/soft money swaps, ranging in size from $10,000 to $345,000, from January 1997 through April 1998. For example, in January of 1997, the Texas Democratic Party made a $150,000 hard money contribution to the DNC in exchange for a $172,500 soft money contribution. *See DNC Swaps Funds With Its State Affiliates*, Wash. Post, Apr. 24, 1998, *available at* 1998 WL 11576610. Similarly, the Democratic State Central Committee of Maryland and the Iowa Democratic Party each sent the DNC $50,000 in hard money in exchange for $55,000 in soft money. *Id.* Although the political parties clearly place a premium on hard money, the institutionalization of hard money/soft money swaps, along with the inherent fungibility of money, renders it practically difficult, if not impossible, to consider the corrupting power of hard money contributions to political parties in a conceptual vacuum that ignores the existence of soft money.

There have been several proposals before Congress to eliminate soft money. Indeed, in the last session of Congress, a majority of the members in both the Senate and the House of Representatives were on record as supporting the elimination of soft money, but the legislation was defeated through a Senate filibuster. If Congress were to eliminate

14. Thus, the Court of Appeals erred when it stated that "[t]he FEC has presented no evidence to suggest that parties have illegally utilized soft money for hard money spending." The FEC presented detailed evidence of the political parties' exchanges of soft money for hard money. (Def.'s Statement of Material Facts Not in Genuine Dispute at ¶¶ 40-49).

soft money, it might choose to raise the political party coordinated spending limits, since the danger of funneling otherwise illegal corporate, union, and large dollar contributions through the political parties would have been reduced. Alternately, Congress might retain the coordinated spending limits out of a fear that eliminating soft money could encourage those seeking influence with members of Congress into making large bundled contributions through the political parties. Elimination of coordinated spending limits could make political parties the vehicle of choice for influence seekers. If this Court takes the issue of coordinated spending by political parties "off the table" by declaring such limits unconstitutional, then Congress may have no means for eliminating any new avenues for corruption that arise after the elimination of soft money.

In sum, the Court of Appeals erred in attempting to assume away the problem of soft money when considering political party coordinated spending. Large donors to the political parties, be they large hard money or large soft money donors, create opportunities for corruption and the appearance of corruption. The courts risk creating havoc with the nation's campaign finance system when they ignore the reality of political party behavior and base their decisions on hypothetical scenarios that bear little relationship to the real world.

C. Unlimited Political Party Coordinated Spending Could Enhance the Potential for Corruption by Shifting Power to Those Members of Congress Who Control the LCCs' Spending Decisions.

A final potential avenue for corruption cited by the FEC while before the trial court was the danger that allowing unlimited coordinated expenditures could provide an opportunity for unethical party officials to use their control over the party's direct contributions and coordinated expenditures to obtain a *quid pro quo* in support of their own

personal interests, or those of their friends, such as political consultants and pollsters, or the faction of the party to which they belong. The FEC argued that eliminating the limits on coordinated party expenditures could have a corrupting effect on the LCC leaders, who are members of Congress, and on Congress itself. The potential for this type of corruption is indeed a serious one.

A popular model of the "ideal" political party — a model that has long been romanticized in the field of political science — is that political parties are unique organizations that provide links between elected officials, party organizations and citizens. *See, e.g.*, V.O. Key, Jr., *Politics, Parties, and Pressure Groups* 163-65 (5th ed. 1964); John Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 10 (1995). This ideal party would not only provide an avenue for citizens to share their concerns with candidates and office-holders, but also would serve as a means to promulgate and promote ideology and to mobilize voters to rally round the party banner. Such a party could dilute the importance of large contributors by involving a mass base of party activists and leaders in fundraising and distribute the money to large numbers of candidates based on merit and ideology. *See* Brief Amicus Curiae Committee For Party Renewal at 7, in *Colorado Republican I, available at* 1996 WL 75770.

In the last twenty years, however, political parties have become increasingly "candidate-centered." Political parties today are characterized by: (i) a decline in volunteer activity and party work among constituents, *see* Virginia Hodgkinson, *Giving and Volunteering in the United States* (1996); (ii) a disconnect between party leaders and the rank-and-file, *see* E.J. Dionne, *Why Americans Hate Politics* 322 (1991); and (iii) the co-mingling of party leadership with leaders in government, making for "candidate-centered" rather than "party-centered" political parties, *see* Martin P. Wattenberg, *The Rise of Candidate-Centered Politics:*

Presidential Elections of the 1980s 34 (1991). The close relationship between party leaders and leaders in government makes the parties ripe for serving as knowing conduits of campaign money between large contributors and political candidates.

The era of "dilution" of the influence of large contributors through party contributions has fallen along the wayside with the myth of the ideal party. In terms of either large soft money contributions or large hard money contributions, party leaders are artful at connecting the contributor with the appropriate beneficiary. As we have seen, this connection can be as simple as coffees with the President in the White House Map Room or golf outings with the House Speaker in Palm Beach. Or the connection can be more business oriented, such as the "cash-for-access confabs on pending bills" arranged through the appreciative party leadership. *See* Phil Kuntz, *Cash-for-Access Policy Forums on Bills Are Common, Controversial in Senate*, Wall Street J., Jan. 25, 2000, at 16.

While executive officials also work in an intimate and undiluted relationship with party leadership, much attention lately has been focused on the reciprocal relationship between party and congressional leaders. One of these avenues for an undiluted connection between large contributors and congressional leaders is the LCC.

Over the last 20 years, the LCCs and their leaders have become important institutional players in Congress and frequently are comprised of congressional leaders themselves. *Compare* Robin Kolodny, *Pursuing Majorities: Congressional Campaign Committees in American Politics* 122-55 (1998), *with* Paul Herrnson, *Party Campaigning in the 1980s* 30-83 (1988). The increasing emphasis within the LCCs on money and fund-raising exacerbates the danger that these committees have become little more than financial conduits for the candidates and an important means for large

contributors to secure access to targeted candidates and officials. LCCs have virtually no ties to the grassroots constituency of the party; rather they exist solely to serve the party leaders and elected congressional members. If one values political parties for their ability to mobilize large groups of voters in a grassroots sense, allowing LCCs to become more dominant players in federal campaigns does not serve to strengthen political parties. Indeed, the greatest danger is not just that LCCs connect large contributors with federal candidates, but that they connect large contributors with congressional leaders. LCCs place large contributors in intimate contact with those who direct the legislative process. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, *supra* at 651; Frank J. Sorauf, *What Buckley Wrought?*, *in If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics*, 11, 31 (E. Joshua Rosenkranz ed., 1999).

Moreover, as LCCs become increasingly important in dispensing money to federal candidates, the members of Congress who have leadership positions within the LCC are gaining increasing power within the institution, which is a potential source of corruption. Of course, it is inevitable in any legislative body that some group of legislators will rise to positions of power and influence within the body. But it is not inevitable that legislators will rise to prominence by virtue of their fundraising prowess, rather than their legislative abilities and success. Although Congress is certainly entitled to choose to reward its members for their fundraising success, it is also entitled to guard itself against the danger that its chief fundraisers will become too powerful *vis-à-vis* other members.

Just as many in society view it as corrupt when the legislative agenda is set by those who have made large contributions, Congress could reasonably view it as corrupting of the institution when raising money, rather than legislative success, becomes a principal means for

advancement in Congress. In recent years, raising funds for and through the LCCs has become a principal means of advancement up the party ranks. By limiting the amount that LCCs can spend in coordination with any given candidate, Congress has put at least some institutional limit on importance of fundraising and the power of its own fundraisers.[15]

Some have argued that allowing unlimited coordinated spending would lead to stronger political parties because LCCs would be able to discipline their members and enforce candidate adherence to the party's goals and platforms. However, there is virtually no political science evidence that would support this conclusion. *See* Robert Boardwright, *"You Don't Know Me, But Here I Am," Congressional Candidates, & Party Strength, in The State of the Parties: The Changing Role of Contemporary American Parties* 320-23 (John Green & Dan Shea, eds., 1999); Dan Shea, *Transforming Democracy: Legislative Campaign Committees and Political Parties* 29 (1995). As a general rule, LCCs do not support candidates based on their fidelity to the party's program or

15. When the House of Representatives in 1920 decided that Speaker Joseph G. Cannon was becoming too powerful *vis-à-vis* his fellow Congressmen, the House stripped the Speaker of the power to appoint committee chairs and reverted to the seniority system. Similarly, in the 1970s, when the House was unhappy with the power exercised by individual committee chairs, it abolished the formal seniority system and made committee chairs and ranking minority positions subject to election by secret ballot in the party caucuses. Congress has always been able to take self-protective measures that were intended to prevent its own members from becoming too powerful, which increases the risk of corruption. By limiting the ability of LCCs to spend unlimited sums, Congress has essentially required the LCCs to spread their monetary resources more broadly. In so doing, it has reduced the power of the LCC leaders by reducing their power to dominate individual members' races with their spending decisions. As with instituting or ending the seniority system for committee chairs, this is a policy choice that Congress is uniquely qualified to make.

platform. Rather, LCCs support candidates almost exclusively for the purposes of winning or maintaining seats. *See* Paul S. Herrnson, *Congressional Elections: Campaigning at Home and In Washington*, 90-100, 115-19 (3d ed. 2000); Jeffrey M. Stonecash & Sara F. Keith, *Maintaining a Political Party: Providing and Withdrawing Party Campaign Funds*, 2:3 Party Politics 313-28 (1996); Frank J. Sorauf & Scott A. Wilson, *Campaigns and Money: A Changing Role for the Political Parties? in The Parties Respond: Changes in the American Party System* 187-203 (L. Sandy Maisel, ed. 1990).

Additionally, there is some anecdotal evidence that individual LCC leaders have used their control of the pursestrings, in the words of Chief Judge Seymour in dissent, to "further[ ] their pet interests, thereby corrupting or appearing to corrupt the legislative process." 213 F.3d at 1243. For example, it was widely-reported in 1998 that the Chairman of the National Republican Senatorial Committee refused to fund his party's candidate in the Washington Senate race because she was a vocal advocate of campaign finance reform and publicly called the Chairman a "money launderer." *See* Nightline Transcript (ABC television broadcast, Nov. 2, 1998) ("Senator Mitch McConnell . . . controlled the Republicans' national campaign kitty and used it to reward and punish candidates."), *available in* 1998 WL 5373168; *GOP Launches Aerial Attack; Democrats Struggle Against Torrent of Money*, Wash. Post, Oct. 18, 1998, *available in* 1998 WL 16563078; *Winners & Losers Sorting Through the Rubble of an Election Day Explosion*, U.S. News & World Rep., Nov. 16, 1998, *available in* 1998 WL 8127587; *State GOP "Outraged" by Cash Snub*, Seattle Post-Intelligencer, Oct. 15, 1998, *available in* 1998 WL 4308445.

When individual members of Congress become increasingly powerful within the institution, not by virtue of their legislative abilities and achievements, but instead

because of their control of the campaign spending decisions of the political parties, there is a potential for a corruption of the democratic processes. Individual members of Congress may become afraid to buck the pet interests of individual party leaders, even when the party itself lacks a firm position on the issue. *See generally* Richard Clucas, *Party Contributions and the Influence of Campaign Committee Chairs on Roll-Call Voting*, XXIII Legis. Stud. Q. 174-94 (1997). While incidents of leadership abuse of their spending power have been relatively rare to date, that situation might well change if coordinated party spending limits are removed. As one experienced Democratic fundraiser testified in the trial court below, "[t]aking away the limits on coordinated expenditures would result in a fundamental transferal of power to certain individual Senators." (Billings Decl. ¶ 19). Surely the Congress has the power to limit the ability of LCCs and their chairs from becoming all-powerful money brokers.

CONCLUSION

The Constitution is silent on the role of political parties in our government structure. We believe that Congress, and not the Courts, has the expertise necessary to make the ultimate determination concerning whether unlimited political party coordinated spending may lead to corruption of our governmental institutions. We agree with Chief Judge Seymour, who noted in dissent, that "it is difficult to credit the bald assertion" of the Court of Appeals that the politicians who passed the Federal Election Campaign Act "gravely misunderstood" the role political parties play in American politics. The legislative determination made by Congress, to grant political parties a preferred status in our campaign funding scheme, but not to grant them unlimited power to make contributions to candidates, is a policy judgment that Congress is uniquely qualified to make. It is likewise a policy judgment that, if left undisturbed by the Court, Congress may itself choose to revise in the future. After all, this is a limitation that members of Congress have imposed on themselves. Intervention by the Court is both unwise and unnecessary.

Respectfully submitted,

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FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR AMICI CURIAE SENATOR JOHN F. REED, CONGRESSMAN SHERWOOD BOEHLERT, CONGRESSMAN F. ALLEN BOYD, JR., SENATOR MAX CLELAND, CONGRESSMAN LLOYD DOGGETT, CONGRESSMAN SAM FARR, SENATOR RUSSELL D. FEINGOLD, CONGRESSMAN MAURICE D. HINCHEY, SENATOR CARL LEVIN, CONGRESSMAN SANDER LEVIN, SENATOR JOHN McCAIN, CONGRESSWOMAN CAROLYN B. MALONEY, CONGRESSMAN JAMES H. MALONEY, CONGRESSMAN MARTIN T. MEEHAN, CONGRESSMAN GEORGE MILLER, CONGRESSMAN DENNIS MOORE, CONGRESSWOMAN JANICE D. SCHAKOWSKY, SENATOR CHARLES E. SCHUMER, CONGRESSMAN CHRISTOPHER SHAYS, CONGRESSMAN JOHN M. SPRATT, JR., CONGRESSMAN JOHN F. TIERNEY, AND CONGRESSMAN ANTHONY D. WEINER IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amici include the following Members of the United States Senate and the United States House of Representatives: Senator John F. Reed, Congressman Sherwood Boehlert, Congressman F. Allen Boyd, Jr., Senator Max Cleland, Congressman Lloyd Doggett, Congressman Sam Farr, Senator Russell D. Feingold, Congressman Maurice D. Hinchey, Senator Carl Levin, Congressman Sander Levin, Senator John McCain, Congresswoman Carolyn B. Maloney, Congressman James H. Maloney, Congressman Martin T. Meehan, Congressman George Miller, Congressman Dennis Moore, Congresswoman Janice D. Schakowsky, Senator Charles E. Schumer, Congressman Christopher Shays, Congressman John M. Spratt, Jr., Congressman John F. Tierney, and Congressman Anthony D. Weiner.

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, is one of several campaign finance laws passed by Congress. *Amici*, a bipartisan group of present Senators and Representatives, believe that the FECA provisions, including the limit struck down by the Tenth Circuit on coordinated spending by political parties are essential, even if not independently sufficient, to maintain the public's confidence in the integrity of our political system.

Moreover, as *amici* told the Court in *Shrink Missouri*, the personal experiences of *amici* since this Court's decision in *Buckley* demonstrate the need for clearer and more comprehensive authority to stem the evasion of existing limits and to vindicate the central premise in *Buckley*—that the government has a compelling interest in ensuring faith in the

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel contributed money or services to the preparation or submission of this brief.

integrity of the political process. *Amici* advocate, and seek to enact, reforms to vindicate that compelling interest. As both elected representatives and seasoned participants in the electoral process, *amici* believe they are entitled to broad deference in the regulation of federal elections. The Court in *Buckley* properly accorded legislatures such deference with regard to contribution limits. The Court should reaffirm that deference with respect to the coordinated expenditure limits at issue here and extend it to campaign finance reforms in general. Without additional reforms, the public's faith and participation in the political process will continue to decline. Such reforms can be enacted without infringing upon First Amendment rights and without stifling the public debate essential to the functioning of our democracy.

SUMMARY OF ARGUMENT

This case, like *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), presents a fundamental challenge to the authority of Congress to defend and protect the integrity of the political process. In the decision under review, a divided Tenth Circuit panel has invalidated 2 U.S.C. § 441a(d)(3) of the FECA insofar as it limits the coordinated expenditures political parties may make on behalf of candidates for federal office. Such restrictions are, as Congress and this Court have recognized for more than two decades, indispensable to any regulatory program aimed at eliminating the risks of unlimited campaign contributions because coordinated expenditures on behalf of a candidate are no different than direct financial contributions to that candidate. *See Buckley v. Valeo*, 424 U.S. 1, 46-47 & n.53 (1976). In the experience of *amici*, the party often simply acts as a conduit for cash between donors and candidates. These coordinated expenditures can, and should, be regulated. As this Court held in *Buckley v. Valeo*, with respect to similar limits, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" 424 U.S. at 27 (*quoting United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

Nothing in the more than two decades of experience since *Buckley* calls into question the Court's decision to uphold the legislative judgment that campaign contribution limits are essential to preserving the public's faith in the electoral process and our representative institutions. To the contrary, the accumulated experience of Members of Congress, reinforced by empirical evidence, is that the dominance of money in politics seriously threatens the public's faith in the legitimacy of government and in the elections that choose whom shall

govern. The issue presented in this case is simply not about censorship. Here "constitutionally protected interests lie on both sides of the legal question." *Shrink Missouri*, 120 S. Ct. at 911 (Breyer, J., concurring). There must be leeway for the government to address the core societal interest, recognized by this Court, *see Buckley*, 424 U.S. at 26-27, in ensuring the integrity—in every sense of the word—of our representative system of government. In *Shrink Missouri*, this Court took an important first step in reaffirming the competing constitutional interests at stake. The instant case provides an appropriate opportunity for the Court to make clear that the First Amendment does not hamstring legislators' attempts to protect the viability of our very structure of government. "[F]or while the Constitution protects against invasions of individual rights, it is not a suicide pact" requiring Congress and state legislatures to stand helplessly by as the public's faith in democracy withers away. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

The needed leeway can be provided, consistent with the First Amendment, in two ways. First, intermediate scrutiny should apply to any campaign finance reform that is justified by reference to something other than the communicative impact of speech. That is clear from this Court's First Amendment jurisprudence since *Buckley*. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) ("*Turner I*"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Ordinarily, campaign finance laws are designed to regulate the underlying activities that generate the speech at issue, not the speech itself. Accordingly, these laws should be reviewed under intermediate scrutiny. *See Turner I*, 512 U.S. at 642-43.

Second, legislatures should be given substantial deference to design and enact campaign finance laws. *Buckley* provided such deference with regard to contribution limits, and the

practical experience of *amici* since *Buckley* with respect to the financing of campaigns has demonstrated that deference is warranted for all such laws. Justice White was correct: the Court should defer to the "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). The Court should allow vindication of the predictive judgments of legislatures as to what campaign finance laws are needed to sustain faith in the electoral process. As this Court has recognized, legislatures should not be held to a standard of proof that "'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.'" *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (*quoting Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

Application of these principles should result in reversal of the Tenth Circuit's judgment in this case.

ARGUMENT

I. Intermediate Scrutiny Should Apply to Campaign Finance Laws Not Aimed at the Communicative Impact of Speech.

The Court should not leave the elected branches of government in a straitjacket, preventing enactment and enforcement of campaign finance laws needed to restore and maintain Americans' faith in "the integrity of [the] electoral process," an attribute "basic to a democratic society." *United States v. International Union, United Auto. Workers*, 352 U.S. 567, 570 (1957). Rather, practical experience since *Buckley*, as well as the Court's own precedent, support application of a lenient standard of review and the provision of substantial deference to legislative judgment. Specifically, as

demonstrated below, this Court should make clear that intermediate scrutiny applies to contribution limits, including coordinated expenditure limits, and to all campaign reforms that are not aimed at the communicative impact of speech, and it should recognize the institutional competence uniquely possessed by legislatures both to identify threats to the electoral system and to implement corresponding reforms.

The Tenth Circuit reviewed the coordinated expenditure limit—which is effectively a contribution limit—under the standard of review articulated in *Buckley* for contribution limits. *FEC v. Colorado Republican Fed. Election Comm.*, 213 F.3d 1221, 1226 (10th Cir. 2000) ("*Colorado Republican II*"). Although the limit can withstand, and should be upheld, under *Buckley*'s articulation, subsequent cases have further developed the law regarding the appropriate level of review. This Court's jurisprudence since *Buckley* has made clear that "[t]he government's *purpose* is the *controlling* consideration" in determining the standard of review for laws challenged on First Amendment grounds. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quotation omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation omitted); *see also Ward*, 491 U.S. at 791. This is true even if the regulation has "an incidental effect on some speakers or messages but not [on] others." *Ward*, 491 U.S. at 791. Indeed, intermediate scrutiny is appropriate for laws that may directly regulate speech activity, as long as the government's justification for doing so is unrelated to the

content of the expression limited by the regulation. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) ("*Turner II*").[2]

Because the appropriate standard of review depends on the government's "overriding objective" in passing the challenged regulation, *see Turner I*, 512 U.S. at 646, campaign finance laws should be subjected to intermediate scrutiny if they are justified on grounds unrelated to the communicative impact of speech. This conclusion is consistent with *Buckley*. That case applied strict scrutiny to the independent expenditure limits at issue because those limits were justified on the basis of the communicative value of the speech. As this Court explained in *Turner I*, "[t]he Government [in *Buckley*] justified the law as a means of 'equalizing the relative ability of individuals and groups to influence the outcome of elections.' . . . Because the [independent] expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).[3]

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[2] The mere fact that campaign finance laws only address laws related to campaign financing does not mean such laws are aimed at the communicative impact of speech. In *Renton*, for example, this Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content—"adult" films—because the government's "predominate concerns" in preventing "secondary effects" were unrelated to suppression of the regulated speech. *Renton*, 475 U.S. at 47 (internal quotation marks omitted).

[3] The *Buckley* Court did reject an argument, premised on *United States v. O'Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *See Shrink Missouri*, 120 S. Ct. at 903 (citing *Buckley*, 424 U.S. at 16). But that is hardly dispositive of *amici*'s argument in favor of intermediate scrutiny. It has been clear at least since *Ward* that it is the government's justification that is

Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government for the campaign finance law relates to the communicative impact of the speech.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance laws. First and foremost, regulating campaign finance increases citizens' faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to "the ideas or views expressed" by campaign contributions. *Turner I*, 512 U.S. at 643. Recent reform efforts in a number of states indicate continued dissatisfaction with the current system of campaign financing.[4] As recognized in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *Letter Carriers*, 413 U.S. at 565).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, Buckley *Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the

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controlling. *Ward*, 491 U.S. at 791.

[4] *See* <http://www.publicampaign.org/statemap.html> (visited Nov.17, 2000) (indicating that, as of February 1999, public financing bills had been or probably would be introduced in 16 state legislatures, coalitions in 18 other states were pursuing reform, and four states—Maine, Vermont, Arizona, and Massachusetts—already have passed such reform by initiative or legislative action); *State Capitols Report* (Sept. 26, 1997) (listing status of reform proposals in all 50 states).

government in general, is exacerbated by public perception that elected officials are more responsive to those who contribute to their campaigns than to those who do not. One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Automobile Workers*, 352 U.S. at 575.

These justifications for reform address a public concern wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure, but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community").

In First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). The principal purpose of FECA's contribution limits, including the coordinated expenditure limits, was to preserve the integrity of the nation's electoral process. That is the basis upon which the government defends the limits at issue here. Pet. at 15-25. This objective of preserving the integrity of the electoral process is wholly unrelated to the communicative impact of the regulated contributions. Intermediate scrutiny is accordingly the appropriate level of review.

II. Substantial Deference Should Be Given to Legislatures to Address the Significant Public Interests Implicated by Campaign Financing.

As we argued in *Shrink Missouri*, the Court also should apply a deferential standard of proof that will allow vindication of legislative judgments of the necessity of campaign finance laws. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); *see also Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 547-48.

This deference has been applied to campaign finance laws even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For

example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)) (alteration in original). There, the Court affirmed a campaign reform, even in the face of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is provided in part because "it is difficult to isolate the exact effect" of campaign finance laws on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance laws, the justification for regulation is declining public faith in the electoral system—a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to assess. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Court therefore has provided deference to permit legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the

avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem was not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never be reliably ascertained.*" *Id.* (emphasis added). Finally, *Buckley* admonished courts to avoid "fine tuning" of legislative limits on contributions. *Id.* at 30.

The Court has reiterated this deferential portion of *Buckley* in subsequent cases. *See FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference"); *id.* (Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was "an appropriate means by which Congress could seek" to advance governmental interest).

Just last Term, the Court accorded similar deference to the legislature in *Shrink Missouri*. Noting that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised," the Court held it was "neither novel nor implausible" that large contributions present dangers of corruption and arouse voters' suspicions in the integrity of the system. *Shrink Missouri*, 120 S. Ct. at 906-07. The Court therefore sustained the contribution limits without demanding much evidentiary proof, concluding

"there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 908.[5]

This deference is appropriate, and should be afforded here. The Tenth Circuit paid insufficient heed to Congress's greater expertise in the campaign finance arena, substituting its paean to political parties for the practical experience of the Congress.[6] The coordinated expenditure limit on political parties reflects the Congressional judgment that, while political parties should be able to engage in larger coordinated expenditures than individuals and other groups, their coordinated expenditures should not be unlimited. *See* 2 U.S.C. § 441a(d)(3).

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[5] The Court in *Shrink Missouri* relied upon an affidavit from a State Senator to the effect that large contributions have "the real potential to buy votes," newspaper accounts of potential improprieties related to large campaign contributions, several campaign financing scandals cited by the Court of Appeals in another case, and a voter referendum reflecting support for contribution limits. *Id.* at 907-08.

[6] The Tenth Circuit's view of political parties is starkly at odds with that of the Founding Fathers, who:

> "feared and despised political parties. The 'root idea' of Anglo-American political thought concerning parties, Richard Hofstadter writes of the founding period, was that 'parties are evil.' Thomas Jefferson denounced party affiliation as 'the last degradation of a free and moral agent.' Alexander Hamilton claimed that the goal of the Constitution was 'to abolish factions, and to unite all parties for the general welfare.' George Washington warned in his Farewell Address against 'the baneful effects of the spirit of party.' Even James Madison, one of the least dogmatic of the founders, thought that political parties were, at best, unavoidable evils in a free society–forces to be condemned, yet patiently endured."

James A. Gardner, *Can Party Politics Be Virtuous?*, 100 Colum. L. Rev. 667, 667-68 (April 2000) (internal citations and footnotes omitted).

In so doing, Congress found that coordinated expenditures are tantamount to direct contributions to a candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Indeed, as noted in *Colorado Republican I*, "many such expenditures are . . . virtually indistinguishable from simple contributions (compare for example, a donation of money with direct payment of a candidate's media bills)." *Colorado Republican Fed. Election Comm. v. FEC*, 518 U.S. 604, 624 (1996) (plurality opinion).[7] In the practical experience of *amici*, contrary to the Tenth Circuit's apparent assumption, a party's coordinated expenditures are often conduits for cash to the candidate, not conduits for information about the party's position on various issues.[8] Any speech that results is really that of the candidate, not that of the party.[9]

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[7] Treating coordinated expenditures as "contributions" is thus consistent with the distinction the Court made in *Buckley* between contributions and expenditures. *See California Med. Ass'n*, 453 U.S. at 195 (plurality) ("The type of expenditures that this Court in *Buckley* considered constitutionally protected were those made *independently* by a candidate, individual, or group in order to engage directly in political speech."). It is undisputed that "[p]arty committees work closely with candidates and campaigns in making coordinated expenditures." *FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1200 (D. Colo. 1999) ("*Colorado Republican II*").

[8] This phenomena is demonstrated by the 2000 campaign, in which party-coordinated advertisements for some candidates touted the candidate's *independence* from the party, including the candidate's positions on issues that were contrary to positions of the party. *See* Katherine Gregg, *GOP Ad Touts R.I.'s "Wayward" Son – Democrats Scoff at Republican Pride in Lincoln Chafee's Votes*, The Providence Journal, Aug. 25, 2000 at A01; Paul Kane, *DSCC Hits Ashcroft For Bill "Torch" Wrote Claritin Patent Becomes Issue in Senate Race*, Roll Call, Sept. 21, 2000.

[9] Limiting coordinated expenditures still leaves ample avenues of communication open for speech by political parties, including the unlimited independent expenditures afforded them by this Court's holding in *Colorado Republican I*.

Therefore, just like the contribution limits at issue in *Buckley* and *Shrink Missouri*, it is neither "novel nor implausible" that large coordinated expenditures by political parties create the appearance of corruption and undermine citizens' faith in the electoral process. As the FEC demonstrated below, *see Colorado Republican II*, 213 F.3d at 1240-44 (Seymour, C.J., dissenting), unlimited coordinated party expenditures create at least the perception that those who donate large sums to political parties for such coordinated expenditures, as well as those within the parties who control the donations to candidates made through coordinated expenditures, may enjoy positions of "improper influence." *Shrink Missouri*, 120 S. Ct. at 905; *see also Colorado Republican I*, 518 U.S. at 648 (Stevens, J., dissenting).[10] Moreover, the ability to donate $20,000 to political parties, *see* 2 U.S.C. § 441a(a)(1)(B), presents the danger that donors would use unlimited coordinated expenditures by parties to evade the contributions limits upheld by *Buckley*. *See California Med. Ass'n*, 453 U.S. at 197-99 (plurality) (upholding contribution limits to multicandidate political

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[10] These concerns about political parties are not new. As explained by Senator Robinson in 1924: "'We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.'" *See United Automobile Workers*, 352 U.S. at 576-77 (quoting 65 Cong. Rec. 9507-08 (1924)).

committees to prevent evasion of other limits); *Buckley*, 424 U.S. at 38 (upholding total contribution limits on individuals for same reason); *see also* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 620 (April 2000) ("In the last decade, party campaign finance practices have blown large, and widening, holes in the campaign finance system that Congress created with the [FECA], and that the Supreme Court modified and sustained in *Buckley v. Valeo*."); 100 Colum. L. Rev. at 665.

There is no danger that the limit here "insulates legislators from effective electoral challenge." *Shrink Missouri*, 120 S. Ct. at 913 (Breyer, J., concurring). The limit allows ample coordinated spending on behalf of challengers.[11] Moreover, as most incumbents and challengers belong to one of the two major parties, the limit on coordinated party expenditures affects incumbents and challengers equally. Indeed, the limit helps to level the playing field for independent challengers who do not belong to a political party, by helping prevent them from being overwhelmed by unlimited coordinated party spending. Such evenhanded restrictions are entitled to deference unless there is evidence of "invidious discrimination against challengers as a class." *Buckley*, 424 U.S. at 31. In fact, as the Court acknowledged in *Buckley*, certain campaign finance laws, including contribution limits, generally will negatively affect incumbents more than challengers. *Id.* at 32.

Accordingly, the Congressional judgment reflected in the limit on coordinated spending by political parties—and in all campaign finance laws—is entitled to deference. Legislatures, not courts, are institutionally better suited to assess the need for

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[11] The coordinated expenditure limit for Colorado candidates for the United States Senate in the 1996 election was almost $171,000. *Colorado Republican II*, 41 F. Supp. 2d at 1201 n.6.

campaign finance laws and what types of laws will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican I*, "Congress surely has both wisdom and experience in these matters that is far superior to ours." 518 U.S. at 650 (Stevens, J., dissenting). "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Missouri*, 120 S. Ct. at 912 (Breyer, J., concurring). The Court must allow vindication of the predictive judgments of legislatures that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

The first-hand experience of *amici* indicates that the campaign laws upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. *See generally* Schultz, *supra*, 18 Rev. Litig. at 113-19.[12] *Amici*'s assessment is supported by empirical evidence. The public's loss of faith in the system is most apparent in citizens' failure to participate in the democratic process. The 1996 presidential election, with its explosion in "soft money" attack advertising, attracted only 49

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[12] *See also, e.g.*, Anthony Corrado, *Party Soft Money: Introduction*, in *Campaign Finance Reform: A Sourcebook* 171-73 (A. Corrado *et al.* eds., 1997) (describing rise of soft money as a means of circumventing FECA contribution limits); Rosenkranz, *supra*, at 94; *Soft Money: A Look at the Loopholes* <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm> (visited Nov. 17, 2000) ("Essentially, soft money blew a hole through the reforms of the 1970s. By any reasonable interpretation, the [1996] campaigns no longer adhered to contribution or spending limits.").

percent of registered voters, the lowest total in 70 years. Rosenkranz, *supra*, at 17. Although participation rose to approximately 51 percent in this year's election,[13] that number is still one of the lowest in the democratic world.[14] Our woeful level of electoral participation can be traced in large part to the perceived influence of large campaign contributors over elected officials. In 1964, 29 percent of Americans believed that the government was "'pretty much run by a few big interests looking out for themselves'" and not "'for the benefit of all people.'"[15] By 1992, that number had ballooned to 76 percent.[16] Numerous opinion surveys confirm that Americans believe elected officials serve wealthy donors and not ordinary citizens. For example, a March 2000 Mellman Group poll found that 87 percent of voters believed that contributions by special interest groups affect the voting behavior of Members of Congress.[17] More bluntly, 71 percent of respondents in a 1994 Gallup Poll agreed with the statement: "Our present system of government is democratic in name only. In fact special interests run things."[18]

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[13] Eric Lipton, *Problems Stir Calls to End "19th Century" Voting Process*, New York Times, Nov. 13, 2000, at A21.

[14] <http://www.fec.gov/pages/Internat.htm> (visited Nov. 21, 2000)

[15] Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1, 3 & n.4 (1996) (citing University of Michigan Center for Political Studies, American National Election Studies 1952-1990).

[16] *Id.* at 3 & n.3.

[17] <http://www.publiccampaign.org/articles/4-3report/report4_3_00.html (visited Nov. 17, 2000).

[18] <http://www.commoncause.org/states/connecticut/polls.htm> (visited Nov. 17, 2000). Numerous polls have produced variations on the same theme. A 1997 *New York Times*-CBS poll found that 75 percent of the public believes "many public officials make or change policy decisions as a result of money they receive from major contributors." Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, New York Times, Apr. 8, 1997, at A1. In a 1994 Bannon Research study of registered voters in five states, 83 percent expressed the view that "politicians pay more attention to monied special interests than people." <http://www.commoncause.org/states/connecticut/polls.htm> (visited Nov. 17, 2000). Similarly, a 1997 CNN-*USA Today*-Gallup poll found that 53 percent of the public believed campaign contributions influenced policy choices "a great deal," while only 11 percent believed the effect was "not much" or "not at all." <http://www.publicampaign.org/pollsumm.html> (visited Nov. 17, 2000). A 1997 Center for Responsive Politics survey found that two thirds of respondents believed the influence of contributions on elections and government policy was a major problem and that their own representatives would listen to the view of a large contributor before that of a constituent; 71 percent believed the high cost of campaigns was discouraging good people from seeking public office. <http://www.opensecrets.org/pubs/survey/s1.htm> (visited Nov. 17, 2000). A study of voters in Minnesota indicated that 88 percent of those surveyed believed that elected officials were more likely to respond to individuals and organizations that contributed to their campaigns than to those who did not. *See* Schultz, *supra*, 18 Rev. Litig. at 121.

Moreover, the Court should not overestimate the impact that campaign finance laws have on First Amendment interests. Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican I*, 518 U.S. at 649-50 (Stevens, J., dissenting).

Public opinion surveys consistently show that Americans want meaningful campaign finance reform.[19] Congress comprises the elected representatives of the sovereign People. U.S. Const. art. I. These representatives should be afforded leeway to address the public's loss of faith in our system of governance. As Justice White admonished in his separate opinion in *Buckley*, the Court should not "claim[] more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed [the campaign finance bill] and the President who signed it." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part).

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[19] A March 2000 Mellman Group poll found that 85 percent of voters believe there is a need for campaign finance reform, with 59 percent of voters believing that "major" reforms are needed. <http://www.publiccampaign.org/articles/4-3report/report4_3_00.html (visited Nov. 17, 2000). Similarly, a 1997 survey found strong consensus for a wide range of finance reform proposals, including limiting "soft money" contributions to political parties (favored by 75 percent of respondents), limiting a candidate's ability to spend personal wealth on a campaign (70 percent), requiring congressional candidates to raise a certain percentage of their campaign funds in their own states (85 percent), and limiting or banning PAC contributions (61 percent). <http://www.opensecrets.org/pub/survey/s1.htm> (visited Nov. 17, 2000), Princeton survey. A 1996 Gallup poll found that 79 percent of respondents favored expenditure limits for congressional candidates. <http://www.publicampaign.org/pollsumm.html> (visited Nov. 17, 2000), *Public Campaign: The Power of Public Opinion*. A variety of polls conducted in 1996 and 1997 also reported that substantial majorities favored various proposals for public financing of federal campaigns. *See id.* (summarizing poll results).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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FEDERAL ELECTION COMMISSION,

Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE COMMON CAUSE AND DEMOCRACY 21 IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 00-191

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE COMMON CAUSE AND DEMOCRACY 21 IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Common Cause and Democracy 21 submit this brief amicus curiae with the consent of the parties.[1]

[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, amici state that this brief in its entirety was drafted by amici curiae and their counsel. No one other than Common Cause and Democracy 21, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Common Cause is a non-profit membership organization with more than 175,000 members nationwide. Common Cause promotes, on a non-partisan basis, its members' interest in open, honest, and accountable government and political representation, and seeks to achieve this objective by making government more responsive to citizens through government and election reform. Common Cause has participated as a party or amicus curiae in numerous Supreme Court and lower court cases concerning the constitutionality and implementation of federal and state election laws.

Democracy 21 is a non-profit, non-partisan public policy organization that favors campaign finance laws to prevent the undue influence of money in American politics and to protect the integrity of the electoral and governmental decision making process. Democracy 21 has researched the relationship between money, power, and influence in the American political process, and has participated as an amicus curiae in litigation involving the constitutionality and implementation of campaign finance laws.

STATEMENT OF THE CASE

The Tenth Circuit affirmed a district court ruling invalidating part of an Act of Congress — limits in the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.* ("FECA"), on the amount a political party may spend in coordination with the election campaigns of Senate and House candidates. The relevant statutory provisions are:

- Section 441a(d), which limits the amount political parties and their committees may spend for and on behalf of the party's candidates in connection with a federal election. The statute provides uniform dollar limits for House races (currently $67,560 in states with only one congressional district, and $33,780 in all other districts) and variable limits for Senate races based on the voting age population in each state (the limits currently range from $67,560 in the least-populated states to $1,636,438 in California). 2 U.S.C. § 441a(d)(3).[2]

- Section 441a(d) works in tandem with three other FECA provisions that cap the amount individuals may give directly to candidates' campaigns, to political party committees, and to all recipients on an aggregate basis. Section 441a(a)(1)(A) limits the amount individuals may give to a candidate's campaign to $1,000 for the primary election and $1,000 for the general election. Section 441a(a)(1)(B) imposes a limit of $20,000 per calendar year on individual contributions to national party committees. Section 441a(a)(3) places an aggregate limit of $25,000 per calendar year on individual contributions.

- FECA also provides that a direct expenditure by a person that is coordinated with a candidate must be considered a contribution by the spender to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i). Specifically, if a person spends funds "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate," that "expenditure" is deemed a "contribution" by the person to the candidate. *Id.*

SUMMARY OF ARGUMENT

The Tenth Circuit's holding that Section 441a(d) violates the First Amendment is inconsistent with controlling precedent giving Congress considerable leeway to set contribution limits where Congress aimed to control actual or apparent corruption by private monied interests. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Nixon v. Shrink Missouri Gov't*

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[2] *See* FEC Press Release (Mar. 1, 2000), *available at* http://www.fec.gov/press/441ad2000.htm.

PAC, 120 S. Ct. 897, *on remand sub nom. Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000). Because Section 441a(d)'s limits on *coordinated* party expenditures are effectively contribution limits, they are subject to less exacting judicial scrutiny than limits on independent expenditures. *See Shrink Missouri*, 120 S. Ct. at 904-05.

Congress enacted Section 441a(d) as part of an integrated statutory scheme designed to combat corruption by private monied interests, or its corrosive appearance, in federal elections. Section 441a(d) accomplishes this accepted objective by curtailing the ability of private monied interests who make large contributions to a party to use the party and its beholden officials as agents to obtain political favors. Section 441a(d) also prophylactically combats corruption by deterring evasion of the statutory limits on direct contributions to candidates by individuals and PACs. The risks of corruption that Section 441a(d) curtails are precisely the risks associated with contributions by private monied interests to candidates and parties that this Court has consistently recognized as sufficient to justify reasonable limits on contributions and their equivalent, coordinated expenditures. *See Shrink Missouri*, 120 S. Ct. at 906-08; *Buckley*, 424 U.S. at 25-27. The defense of Section 441a(d) does not, in our view, turn at all on any showing that political parties acting independently of their contributors can corrupt party candidates.

Section 441a(d) is closely drawn to accomplish its objectives in that it minimally burdens First Amendment rights. As demonstrated by the record-shattering political spending that occurred in this year's elections, Section 441a(d) leaves political parties with ample opportunities to support and communicate on behalf of their candidates on a coordinated basis. Moreover, under this Court's decision in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 ("*Colorado I*"), *on remand*, 96 F.3d 471 (10th Cir. 1996), *on remand*, 41 F. Supp. 2d 1197 (D. Colo. 1999),

aff'd, 213 F.3d 1221 (10th Cir.), *cert. granted*, 121 S. Ct. 296 (2000), parties are free to make unlimited independent expenditures on behalf of their candidates. There is no evidence in the record suggesting that Section 441a(d) has demonstrably restricted the ability of candidates to raise and expend sufficient funds to communicate their positions.

In enacting Section 441a(d), Congress, using its expert judgment, struck a balance between combating corruption and enhancing the role of political parties in the electoral process. In striking down Section 441a(d), the Tenth Circuit inappropriately substituted its judgment for that of Congress. *See Shrink Missouri*, 120 S. Ct. at 906 n.5, 912; *FEC v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1233 (10th Cir.) (Seymour, C.J., dissenting), *cert. granted*, 121 S. Ct. 296 (2000); *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982); *Buckley*, 424 U.S. at 29-30.

ARGUMENT

I. SINCE THIS COURT PROPERLY CONSIDERS COORDINATED EXPENDITURES TO BE "CONTRIBUTIONS," SECTION 441A(D)'S LIMIT ON COORDINATED SPENDING REQUIRES LESS COMPELLING JUSTIFICATION THAN RESTRICTIONS ON INDEPENDENT SPENDING.

Congress in enacting FECA determined that when a person coordinates a political expenditure with a candidate, that expenditure is the practical equivalent of, and therefore constitutes, a "contribution" subject to FECA's limits. *See* 2 U.S.C. § 441a(a)(7)(B)(i). This Court has in a variety of contexts accepted that determination.

In *Buckley*, the Court found that Congress had in FECA characterized "controlled or coordinated expenditures" as "contributions rather than expenditures." *Buckley*, 424 U.S.

at 46.[3] The Court endorsed Congress's reasoning: to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47; *see id.* at 46 n.53.[4] The Court later held that expenditures that political action committees (PACs) coordinate with political candidates are also properly deemed "contributions" to the candidates under FECA. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 492 (1985).

Still later, in *Colorado I*, the Court cited the portions of *Buckley* just discussed when it described the "*contribution* limits" it had previously found constitutional as "limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute *by making expenditures that they coordinate with the candidate*." *Colorado I*, 518 U.S. at 610 (emphasis added). Pointing to the difference that coordination makes in the constitutional analysis, the Court in *Colorado I* emphasized that "lack of coordination between the candidate and the source of the expenditure" was "*the constitutionally significant fact*" in its decision. *Id.* at 617 (emphasis added).

In accordance with Congress's determination and this Court's decisions, the court below correctly treated coordinated party expenditures as contributions for purposes of its constitutional analysis. *See Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1226-27 ("Since FECA treats

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[3] The Court in *Buckley* analyzed Section 608(c)(2)(B) of FECA, which was subsequently replaced by the analogous provision at issue here, 2 U.S.C. § 441a(a)(7)(B)(i).

[4] Likewise, in the context of upholding FECA's limits on volunteers' incidental expenses, the Court found that "[t]he expenditure of resources at the candidate's direction . . . provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate." *Buckley*, 424 U.S. at 36-37.

coordinated expenditures as 'contributions,' and the Court has recognized this statutory classification, we apply the foregoing standard [for contributions] to our review of the Party Expenditure Provision.") (citations omitted), *cert. granted*, 121 S. Ct. 296 (2000). That portion of the Tenth Circuit's decision should be upheld.

This Court has consistently ruled that contribution limits do not impose a significant burden on political communication. In *Buckley*, the Court reasoned that the communicative quality of a contribution rests with the symbolic act of contributing and not with the amount of the contribution. *Buckley*, 424 U.S. at 21. On this basis, the Court held that "[a] limitation on the amount of money a person may give to a candidate . . . involves little direct restraint on his political communication . . . ." *Id.*; *see also Colorado I*, 518 U.S. at 615 (reiterating that "restrictions on contributions impose 'only a marginal restriction upon the contributor's ability to engage in free communication'") (quoting *Buckley*, 424 U.S. at 20-21). Recently, the Court explained that *Buckley* "thus said, in effect, that limiting contributions left communication significantly unimpaired." *Shrink Missouri*, 120 S. Ct. at 904.

Accordingly, the Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986). And it has "been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them." *Shrink Missouri*, 120 S. Ct. at 904. The Court summarized this jurisprudence in *Shrink Missouri*:

> [u]nder *Buckley*'s standard of scrutiny, a contribution limit involving "significant interference" with associational rights could survive if the Government demonstrated that contribution regulation was "closely drawn" to match a

> "sufficiently important interest," though the dollar amount of the limit need not be "fine tun[ed]."

Id. (quoting *Buckley*, 424 U.S. at 25, 30) (internal citations omitted). Since coordinated spending is properly treated as a contribution under FECA and this Court's decisions, the Court should apply the *Shrink Missouri* standard in determining the constitutionality of Section 441a(d)'s limit on coordinated party expenditures.

II. SECTION 441A(D) SERVES A CONSTITUTIONALLY SUFFICIENT GOVERNMENTAL INTEREST — COMBATING ACTUAL AND APPARENT CORRUPTION BY PRIVATE MONIED INTERESTS.

Congress enacted Section 441a(d) as part of an integrated statutory scheme to further the government's legitimate interest in combating actual and apparent corruption by private monied interests in connection with federal elections. *Buckley* held that Congress has a constitutionally sufficient interest in regulating campaign contributions and coordinated expenditures. *See* 424 U.S. at 25-26; *see also Colorado I*, 518 U.S. at 609. The Court recognized the significant danger that large private interests can secure political quid pro quos from candidates through large campaign contributions. *See Buckley*, 424 U.S. at 25-26. "Of almost equal concern . . . [was] the impact of the appearance of corruption stemming from the public awareness of the opportunities for abuse inherent in a regime" influenced by private interests. *See Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . .") (internal quotations omitted). The Court found these dangers to be both grave and "inherent in a system permitting unlimited financial contributions." *Id.* at 28.

The Court revalidated these conclusions in *Shrink Missouri*: "Leave the perception of impropriety unanswered,

and the cynical assumption that donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri*, 120 S. Ct. at 906. The Court concluded that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 908.

Section 441a(d) works to curtail actual and apparent corruption in two ways. First, it curtails the ability of private interests who make contributions to party committees from using those party committees and their beholden officials as their agents to obtain political favors from candidates or officeholders. Second, it curbs evasion of the $1,000 limit on individual contributions and the $5,000 limit on PAC contributions to candidates: political parties are restrained from using coordinated expenditures to launder $20,000 donations from individuals or $15,000 donations from PACs into contributions to candidates that are well in excess of the individual or PAC contribution limits. Section 441a(d) thus addresses the long-acknowledged risks associated with private contributions to candidates. *See Shrink Missouri*, 120 S. Ct. at 905-07.

Section 441a(d) achieves these objectives only imperfectly, to be sure. Other measures, such as a reduction in the $20,000 cap on contributions to party committees, also could be implemented to help achieve Congress's objectives. But Congress was trying to and — using its uniquely expert judgment in this field, *see Shrink Missouri*, 120 S. Ct. at 906 n.5, 912 (Breyer, J., concurring) — did strike a balance in Section 441a(d) between two objectives that were somewhat in tension — enhancing the role of parties and curbing the corrosive influence of private money. While the result may not be the perfect antidote to corruption, courts should not substitute their judgment for that of an expert legislature. "[D]etermining which measures suitably balance the nurture of political parties and the prevention of their use as tools of

corruption is a matter for the legislative rather than the judicial process." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1239 (Seymour, C.J., dissenting).

A. Section 441a(d) Helps Prevent Large Contributors from Obtaining Political Favors by Using Political Parties as Their Agents.

Section 441a(d) serves the legitimate purpose of reducing the extent to which private interests use the political parties and their officials as intermediaries to obtain access to and favored treatment from party candidates. Some private interests make contributions to political parties to influence party candidates and officeholders. Such contributions can and do lead to the actual and apparent corruption that Congress has sought to combat. By limiting a party's ability to pass potentially corrupting contributions through to candidates, Section 441a(d) curtails to a useful degree the ability of private donors to extract political quid pro quos from a candidate by contributing to the candidate's party and, concomitantly, it dispels the corrosive appearance that party donations buy candidate fealty.

Historical and experiential evidence supports the common-sense proposition that private interests attempt to corrupt the electoral process by using political party personnel as agents to seek political favors from the party's candidates or officeholders in exchange for contributions to the party.[5]

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[5] As early as 1924, one Senate leader explained that:

> one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.

United States v. United Auto. Workers, 352 U.S. 567, 576-77 (1957) (quoting 65 Cong. Rec. 9507-08 (1924) (statement of Sen. Robinson)).

- Recently, a California businessman named Johnny Chung admitted that he made contributions to the Democratic National Committee (DNC) with the understanding that he would receive, through the party, access to various politicians, including the President. In an interview, Mr. Chung answered:

  > [Q:] And when you began to give money to the DNC, did it make it a lot easier for you to get into the White House?
  >
  > [A:] It will be more easier to do it that way, or I believe if I don't do it, I won't even have a meeting occur.

  (Joint Appendix in 10th Circuit (J.A.) at 275-76.)

- In 1995, the DNC attempted to use the White House to influence an Interior Department decision on behalf of large contributors to the DNC. After meeting with Indian tribe representatives who were making large donations to the party, a senior DNC official called a senior member of the White House staff in an effort to persuade the White House to press the Department of Interior to issue a ruling on a casino license application that favored the Indian tribes. S. Rep. No. 105-167, at 44-46 (1998).

- Also during the mid-1990s, one Roger Tamraz, who was attempting to secure government "backing for his oil pipeline project in the Caucasus," gave large donations to the DNC, concededly for the purpose

of securing access to and support from high ranking executive branch officials. The DNC Chairman allegedly intervened on Tamraz's behalf "in a series of *highly* inappropriate contacts with CIA officials." *Id.* at 43.

- More generally, former Senator Timothy Wirth testified in this case that, throughout his time as a Senator, party officials approached him on behalf of party contributors who sought access to him so that they could press their legislative agenda. (J.A. at 545.)

- Likewise, the record reflects that, throughout the 1980s and early 1990s, as a direct result of contributions to the Democratic Senatorial Campaign Committee (DSCC), party officials often contacted Senate personnel to arrange meetings with Senators on specific topics important to the donors. (J.A. at 453-54.)

These particular examples evidence the general, common-sense point that private interests who have made large contributions to political parties try to use those parties and their officials as agents in efforts to obtain political favors from candidates and officeholders. Some of these examples happen to involve "soft money" contributions which are not regulated by Section 441a(d). Those examples nevertheless illustrate the actual and potential abuses that inherently arise from contributions to political parties. It was Congress's judgment that Section 441a(d) is a useful (albeit incomplete) prophylactic device to curb such abuses, while at the same time permitting activities that enhance the role of parties in our democracy.

These examples, as well as others in the record, validate Congress's judgment that such corruption exists and needs to be remedied:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Shrink Missouri, 120 S. Ct. at 906.[6]

Congress's decision to allow individuals to contribute up to $20,000 to national party committees does not reflect a determination that contributions to parties of that magnitude are free from the seeds of actual or apparent political corruption. When Congress struck a balance by allowing much larger contributions to parties than to candidates, it did so as part of an integrated statute that included the provision the Tenth Circuit struck down — Section 441a(d). It is that provision that helps to uncouple party candidates from the large contributions party committees receive from private donors — contributions that carry, according to both Congress and this Court, the strong stench of actual and apparent corruption. Therefore, the only proper inference to draw from the relatively high cap Congress placed on contributions to party committees is that Congress made the judgment that a relatively high party contribution limit is tolerable only so long as Section 441a(d) limits the ability of party committees to act as contributors' agents in passing money through to candidates on behalf of donors.

Finally, the constitutionality of Section 441a(d) does not, in our view, turn on any showing that political parties acting independently of their contributors can or do corrupt party

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6 This Court cited to similar anecdotal evidence from various sources, including newspaper articles, in upholding Missouri's limits on individual contributions to candidates. *See Shrink Missouri*, 120 S. Ct. at 907.

candidates. The issue therefore is not whether there are any "special dangers of corruption associated with political parties" themselves. *See Colorado I*, 518 U.S. at 616, 618. Section 441a(d) is fully consistent with the view that political parties play a critical role in our democracy. Indications in FECA's legislative history that Congress sought, among other objectives, to enhance the role of parties do not, therefore, undermine the conclusion that Section 441a(d) passes constitutional muster.

B. Section 441a(d) Also Deters Evasion of the Constitutional Limits on Direct Private Contributions to Candidates.

In addition, Section 441a(d) is a vital part of Congress's integrated statutory attack on corruption, because it prophylactically deters individual donors, PACs, and candidates from evading other limits whose constitutionality is beyond doubt — the $1,000 limit on individual contributions to candidates, and the $5,000 limitation on PAC donations. *See Buckley*, 424 U.S. at 26-35 ("It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation."). If there were no limit on the amount parties could spend in coordination with their candidates, those candidates would have an unlimited incentive to advise contributors who had already given the statutory maximum to give an additional $40,000 over the course of two years in a House race (or $120,000 over six years for Senators) to the party's committee, which could use all of that money to support that candidate's campaign.

Congress correctly concluded that this type of evasion will occur in the absence of limits on coordinated party expenditures. Indeed, the evasion of individual limits already occurs to some extent. Candidates ask special interest donors

who have "maxed out" on direct contributions they may legally give to the candidate to give additional sums to the candidate's party, with the understanding that the party will spend the funds on behalf of the candidate.

One disturbing example is the DSCC's system of "tallying" in which contributors may ask that their donations be "tallied" to a certain Senator's "tally account." *See* Ruth Marcus, *Contributors 'Tally' Up, Around Limits*, Wash. Post, Oct. 9, 1996, at A1. As the DSCC decides how much to spend on various Senate races, it considers how much each Senate candidate has in his or her "tally account." *Id.* The Senate candidates often believe that the amount in the tally account is money they can spend on their campaign. For example, a Texas Senate candidate, when asked how much his campaign had to spend, included in his answer "some tally money of about $150,000. . . . that, you know, people have tallied in my name to the DSCC." *Id.*

Additional examples demonstrate the evasion of the rules that is possible through the tally system. One Senator actively solicited money from a union's PAC even though it had already contributed the maximum under the law to the Senator. At the request of the Senator and his fundraisers, the PAC donated an additional $14,250 to the DSCC, asking the party to "tally" the funds for the Senator. Greg Gordon, Tom Hamburger & Chadwin Thomas, *The Politics of Money*, Star Trib., Nov. 2, 1996, at 1A. Thus, candidates themselves may raise funds for the party committees with the tacit understanding and expectation that the contributions will be passed through to the candidate.[7]

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[7] Although Section 441a(a)(8) deems a contribution to a party earmarked to a specific candidate as a contribution to the candidate himself, that provision is not sufficient to prevent the evasion of lawful limits by the "tally" system. Under the "tally" system, contributions are made which, while not technically earmarked to a candidate under Section 441a(a)(8), are effectively earmarked to the candidate, and as

Such evasion would be greatly exacerbated if Section 441a(d)'s limits on coordinated expenditures were struck down. Without those limits, the parties essentially could give any "tallied" (or otherwise implicitly earmarked) funds from an unlimited number of donors to House and Senate candidates. In a de facto sense, the $1,000 individual contribution limit to candidates would be increased by $40,000 for House races or by $120,000 for Senate races, by allowing an individual's annual $20,000 contribution to a party to be effectively passed through to a candidate. PAC contribution limits would be similarly increased by $15,000 per year (in addition to the $5,000 limit on PAC contributions to candidates).

This Court has consistently upheld congressional measures designed to curb evasion of contribution limits the Court has sustained. In *Buckley*, the Court upheld FECA's annual aggregate $25,000 limit on an individual's contributions, because it is "a corollary of the basic individual contribution limitation." 424 U.S. at 38. The aggregate limit is necessary to prevent evasion of the annual $1,000 limit "by a person who might otherwise contribute massive amounts of money to a particular candidate through use of unearmarked contributions to political committees likely to contribute to that candidate, *or huge contributions to the candidate's political party*." *Id.* (emphasis added). Likewise, in upholding FECA's $5,000 limit on individual contributions to multicandidate political committees, the Court stated that "an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee." *California Med. Ass'n v. FEC*, 453 U.S. 182, 198 (1981) (plurality).

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demonstrated above, the candidate often expects that such money will be spent on his campaign.

III. SECTION 441A(D) IS CLOSELY DRAWN TO SERVE CONGRESS'S ANTI-CORRUPTION INTEREST.

This Court's jurisprudence establishes that the anti-corruption goals served by Section 441a(d) justify the imposition of the type of restriction at issue here. *See Shrink Missouri*, 120 S. Ct. at 904-05; *Buckley*, 424 U.S. at 26-27; *National Right to Work Comm.*, 459 U.S. at 207-210; *California Med. Ass'n*, 453 U.S. at 197-98. The statute sweeps no more broadly than justified by the important interests it serves.

A. Section 441a(d) Leaves Political Parties Ample Avenues To Communicate Support for or Opposition to Candidates.

Section 441a(d)'s limit on coordinated spending does not impose a burden on political parties' communication that is any more significant than the marginal burden imposed on individual or PAC expression that results from the contribution limits that were at issue in *Buckley* and *Shrink Missouri*. There is no evidence in the record or in experience suggesting that Section 441a(d) "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. To the contrary, political parties have numerous, wide avenues for advocating for or against political candidates or positions, particularly after this Court's holding in *Colorado I* that parties may make unlimited independent expenditures for or against candidates.

Section 441a(d) allows parties to engage in a considerable amount of coordinated spending with their

candidates.[8] The district court noted that the Democratic and Republican parties together made over $35 million in coordinated expenditures in 1996. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1200 n.4 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir.), *cert. granted*, 121 S. Ct. 296 (2000).[9] In the year 2000, Section 441a(d) allowed party state and national committees to make coordinated expenditures for each of their Senate candidates that range from $67,560 (in Delaware) to more than $1.6 million (in California), depending on a state's voting-age population.[10] State party committees often authorize national party committees to make their expenditures, effectively doubling the amounts national parties may lawfully spend.

Furthermore, after *Colorado I*, political parties may make unlimited independent expenditures to advocate the election of their chosen candidates. As the FEC pointed out in its 10th Circuit brief, in 1996, the first election cycle in which these party expenditures were permitted, the National Republican Senatorial Committee reported making $9,734,445 in independent expenditures, and the DSCC reported making $1,386,022 in independent expenditures. (FEC 10th Cir. Br. at 9.) In light of these ample opportunities for expression, it cannot seriously be contended that Section 441a(d) prevents parties from

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8 In addition, the parties may make direct contributions to their candidates. For example, party national committees may contribute up to $17,500 directly to each Senatorial candidate. *See* 2 U.S.C. § 441a(h).

9 The FEC's 10th Circuit brief asserted that in 1996 the Republican party committees spent a combined total of $30,959,151, and the Democratic party committees spent $22,576,000, on coordinated expenditures. (FEC 10th Cir. Br. at 8.)

10 *See* FEC Press Release (Mar. 1, 2000), *available at* http://www.fec.gov/press/441ad2000.htm. FECA's dollar limit on party committee contributions or coordinated expenditures was $202,000 per Senate candidate in Colorado this year. *See id.*

amassing or spending "the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

Nor has there been any showing on the record that, as a result of Section 441a(d), candidates have trouble accumulating sufficient funds to mount effective campaigns. *See Buckley*, 424 U.S. at 21; *Shrink Missouri*, 120 S. Ct. at 908-09. To the contrary, campaign spending by House and Senate candidates has increased from $99 million in the 1976 election cycle[11] to well over $683 million in the 2000 cycle.[12] Moreover, candidates in particular races have spent ever more staggering sums: much was made of the fact that the Republican and Democratic candidates in the 1994 California Senate race spent a then-record $44.3 million; this year, the Republican and Democratic candidates in the New York Senate race broke that record by spending $59.3 million.[13] And this year, spending in a single California congressional race topped $9.7 million.[14]

Any burden Section 441a(d) may be seen as imposing on the associational rights of parties and candidates seems more theoretical than real. Candidates remain free to join parties, to campaign under their banner, and to coordinate large expenditures with their parties; and parties remain free to make unlimited independent expenditures on behalf of their candidates. This does not rise to a "significant interference" with associational rights. *Shrink Missouri*, 120 S. Ct. at 904

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11 Common Cause, *Study of Campaign Finance: Fundraising, PAC Giving and Expenditures 1976 through 1994* (Oct. 1995) (based on FEC reports).

12 *See* FEC Press Release (Nov. 2, 2000), *available at* http://www.fec.gov/press/110200totals.htm.

13 Common Cause, *98 Percent of House Incumbents Win Reelection In 2000; 23 of 28 Senate Incumbents Reelected; Incumbents Enjoy Huge Fundraising Advantage, According To Common Cause* (Nov. 14, 2000), *available at* http://commoncause.org/publications/nov00/111400wl.htm.

14 *Id.*

(internal quotations and citation omitted). In *Buckley*, the Court pointed to the same considerations in upholding individual contribution limits:

> The overall effect of the Act's contribution ceilings is merely . . . to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21-22. The same is true of Section 441a(d): it does not affect the total amount of money available for political expression because parties can spend funds above the coordinated expenditure limit on independent expenditures.

In sum, Section 441a(d) does not significantly limit parties' or candidates' political expression or association; rather, it limits only the parties' and candidates' coordination of spending. The provision withstands First Amendment scrutiny because it is closely drawn to focus only on what this Court has called "the constitutionally significant fact" that an expenditure when coordinated with a candidate is transformed. *See Colorado I*, 518 U.S. at 617.

B. The Tenth Circuit Failed To Defer to Congress's Superior Expertise in Identifying and Countering Political Corruption.

The Tenth Circuit impermissibly substituted its own judgment for that of Congress regarding the need for and efficacy of Section 441a(d). That decision flouts this Court's repeated admonition that courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Nat'l Right to Work Comm.*, 459 U.S. at 210; *see also Shrink Missouri*, 120 S. Ct. at 906 n.5, 912 ("Where a legislature has significantly

greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments . . . .") (Breyer, J., concurring); *Buckley*, 424 U.S. at 29-30.

The Tenth Circuit overstepped its authority by finding that Section 441a(d) did not serve either the goal of combating direct corruption by private interests who use parties as agents to obtain political favors or of curbing evasion of contribution limits already judged to be constitutional. First, in holding that it would "not validate limits on the protected speech of a political party as a back-door means of stemming corporate involvement in the legislative process," 213 F.3d at 1229, the Tenth Circuit failed appropriately to defer to Congress's determination that such prophylactic measures were useful in curbing actual and apparent corruption by large private contributors who use parties as agents in their efforts to seek influence. As the evidence outlined in the previous section demonstrated, such corruption is a problem that Congress was wise to address.

Second, the Tenth Circuit inappropriately substituted its judgment for that of Congress in holding that Congress sufficiently addressed the evasion problem by enacting Section 441a(a)(8), which provides that earmarked contributions qualify as direct contributions against the individual limit. *See* 213 F.3d at 1232. As Judge Seymour reasoned in dissent, this Court has made clear that it is within Congress's judgment to decide whether measures in addition to Section 441a(a)(8) were necessary to address the evasion problem. *See id.* at 1243 (Seymour, C.J., dissenting); *see also Buckley*, 424 U.S. at 28; *Shrink Missouri*, 120 S. Ct. at 908 n.7. This is especially true where the burden on speech is not the greater burden associated with independent expenditures. *See Colorado I*, 518 U.S. at 617.

To be sure, Section 441a(d) does not go to the extreme necessary to keep the individual limit inviolate — banning all party expenditures that are coordinated with a candidate and

are financed by contributions from individuals who have made contributions to the candidate. That some evasion of the individual limits may occur, however, does not invalidate Congress's efforts to address the problem by enacting reasonable limits on party coordinated expenditures that at the same time take into account Congress's desire to enhance the role of parties in federal elections. *See Buckley*, 424 U.S. at 30 ("Congress' failure to engage in such fine tuning does not invalidate the legislation.").[15]

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[15] A decision affirming the Tenth Circuit's ruling also could have grave implications for the public financing system in place for presidential campaigns. Presidential candidates who accept public funding agree not to accept additional contributions, including expenditures by political parties (and others) coordinated with the candidates. *See* Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.* (general election); Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031 *et seq.* (primary elections). A ruling by the Court striking down the limits on party coordinated expenditures could threaten the very basis for the system of presidential campaign financing that has been in place for decades.

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit should be reversed.

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December 1, 2000

No. 00-191

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE MISSOURI REPUBLICAN PARTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the government carry its burden of demonstrating that limits on the amount of financial support provided by political parties to their candidates are closely drawn to prevent corruption or the appearance of corruption?

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INTEREST OF THE *AMICUS CURIAE*

Amicus Missouri Republican Party (MRP) is a political party committee organized under Missouri law. The MRP's primary goals are to take control of state government by electing Republican candidates to statewide office and to the state legislature and, in turn, to implement Republican policies and principles. The party's fate is inextricably tied to its candidates. The MRP, like other political parties, can give effect to its views "only by selecting and supporting candidates." *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) (*Colorado I*).

Missouri imposes "contribution" limits on the amount of financial support that political parties can provide their candidates. These limits substantially interfere with the MRP's ability to recruit candidates, to provide seed money to its candidates, and to "target" its financial support on particular races critical to its goal of taking control of state government. The MRP believes that consideration of these state law limits on political party "contributions" will put the federal limits on coordinated expenditures in sharper focus, and the *amicus* accordingly submits this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. The MRP, like all political parties, "targets" its financial support to candidates who have a chance of winning races that will help the party capture control of the legislature and

---

1. The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

the executive branch. Targeting party support is critically important. In the Missouri 1996 general elections, for example, a switch of about 3,000 votes in key legislative districts would have permitted the MRP to take control of the state legislature for the first time since 1948. Similarly, in the 2000 elections, the MRP was only six seats away from controlling the state house and only two seats away from controlling the state senate, and the party targeted its financial support on three to five senate races and some twenty house races.

2. A political party's financial support for its candidates can, in theory, include independent expenditures, coordinated expenditures, and simple contributions.

a. An independent expenditure is one made by a political party without any consultation or coordination with its candidate.

b. A coordinated expenditure is one made by a political party in consultation and coordination with its candidate. A political party makes cash coordinated expenditures either by purchasing goods and services for its candidate or by contributing party funds to its candidate to purchase these goods and services. A political party makes non-cash coordinated expenditures by providing goods (*e.g.*, a mailing list) and services (*e.g.*, campaign advice) to its candidate.

c. A simple contribution is financial support provided to a candidate without any conditions, explicit or implicit, on the use of the funds by the candidate.

3. Like most political parties, the MRP makes independent expenditures and coordinated expenditures, and it does not make simple contributions.

a. The MRP believes that coordinated expenditures are the most effective way to achieve its goals. Coordinated expenditures, unlike either independent expenditures or simple contributions, allow the party and the candidate to

plan the campaign together and to coordinate their message. After the MRP and its candidate consult, the party either purchases goods and services for its candidate or contributes party funds to its candidate to purchase these goods and services. Although some may label the party support an "expenditure" in one case and a "contribution" in the other case, the use of the party's funds is the same. In each case the MRP provides financial support to its candidates to achieve the party's goal of taking control of government.

b. The MRP does not make simple "contributions" to candidates. In order to achieve its goal of taking control of government, the party always controls, explicitly or implicitly, the use of its funds. The MRP provides financial support for Republican candidates only after consultation with the candidate and the candidate's committee and in cooperation with the candidate and the candidate committee. It provides this support with the expectation and understanding that its candidates will use the party's resources to promote the ideas of the Republican party and for the party's purpose of taking control of government. Although candidates may view party support as a "contribution" to their campaigns, the party spends its funds only to achieve the party's ends.

c. The MRP makes independent expenditures, as opposed to coordinated expenditures, only because Missouri law limits the amount of cash and in-kind support that political parties can provide their candidates. An independent expenditure – the expenditure of party money on behalf of the party's candidate without the knowledge of the candidate – artificially separates the party and its candidate. Independent expenditures are not as effective as coordinated expenditures. For example, when state law limits on coordinated support force the MRP to make an independent expenditure, the party cannot discuss with its legislative candidate the best approach to voters in the candidate's district, the best timing for campaign messages, the set of

voters, like senior citizens, who may be critical to the success of the campaign, or other important matters.

4. Missouri law limits, as "contributions," the amount of both cash and in-kind support provided by political parties to their candidates.[2] Although Missouri does not limit the amount of independent expenditures made by a political party, the slightest degree of cooperation and coordination between a political party and its candidates makes the party's support a "contribution" subject to the state law limits. *See* Missouri Ethics Commission, Opinion No. 00.05.100—1 (May 15, 2000)

5. Missouri's "contribution" limits prevent the MRP from targeting its financial support to candidates whose success is necessary to achieve the party's goal of taking control of government: in every targeted race from 1988 to 1998 (with the exception of 1996 when the limits were in effect), the MRP's support for its targeted candidates far exceeded the state law limits. These "contribution" limits also (1) reduce the number of candidates in primary elections and reduce spending in primary and general elections, (2) interfere with the MRP's ability to use primaries to field its best candidates, (3) prevent the MRP from providing seed money necessary to recruit candidates, and (4) force the MRP to support its

2. The statute limits "the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee" to elect an individual to: $10,000 for the offices of governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general; $5,000 for the office of state senator; $2,500 for the office of state representative; and "[t]o elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought." Mo. Rev. Stat. § 130.032.4 (Supp. 1999). In an unopposed primary election, the maximum "contribution" made by a political party is one-half the otherwise applicable limit. *Id.* Each even-numbered year these "contribution" limits "shall be increased" to take inflation into account and "rounded to the nearest twenty-five-dollar amount." *Id.* § 130.032.2

candidates by independent expenditures that are not as effective as coordinated expenditures. These burdens on the MRP have a systemwide effect precisely because the goals of the party are systemwide – to take control of state government and to implement the party's policies on a systemwide (statewide) basis.

6. The Court of Appeals for the Eighth Circuit held that Missouri statutes limiting the amount of cash and in-kind "contributions" made by political parties to their candidates violate the First Amendment. *Missouri Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir.), *application for stay denied sub nom. Nixon v. Missouri Republican Party* (No. 00-A241), 121 S. Ct. 31 (2000). Missouri has stated an intention to seek review of the Eighth Circuit's judgment.

SUMMARY OF ARGUMENT

Political parties speak through their candidates. Limits on the amount of financial support provided by political parties to their candidates – whether that support is labeled a "coordinated expenditure" or a "contribution" – impose substantial burdens on the parties' speech. These limits prevent political parties, like the Missouri Republican Party, from targeting financial support to candidates whose success is necessary for them to capture control of government and, in turn, to implement their policies.

To justify these burdens on political speech, there must be some "real problem" or some "real harm." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1888, 1891, 1893 (2000). The Court, of course, has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 907 (2000), and the government "must present more than anecdote and supposition." *Playboy Entertainment Group*, 120 S. Ct. at 1891. Thus, under *Nixon*, the government must demonstrate that individual contributions cause corruption or the appearance of corruption and that limits

on individual contributions are "closely drawn" to prevent these harms. *See Nixon,* 120 S. Ct. at 904.

Although limits on the amount of financial support provided by political parties to their candidates impose greater burdens on political speech than limits on individual contributions, the Tenth Circuit applied the *Nixon* standard to the federal limits on coordinated expenditures. Even under this deferential standard, these limits violate the First Amendment. The Tenth Circuit held correctly that the government had "not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process." *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1233 (10th Cir. 2000) (footnote omitted). Moreover, given provisions that already address the risk that individuals may attempt to circumvent limits on their contributions by using political parties as conduits, the Tenth Circuit also held correctly that limits on the amount of financial support provided by political parties are not "closely drawn" to enforcing limits on an individual's own contributions. *Id.* at 1232-33.

A recent decision of the Eighth Circuit completely supports the Tenth Circuit's judgment. The Eighth Circuit, which also applied the deferential *Nixon* standard, held that state law limits on political party "contributions" violate the First Amendment because "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." *Lamb*, 227 F.3d at 1073.

ARGUMENT

I. THERE IS NO CONSTITUTIONALLY SIGNIFICANT DIFFERENCE BETWEEN CASH "CONTRIBUTED" BY POLITICAL PARTIES TO THEIR CANDIDATES AND CASH "SPENT" BY POLITICAL PARTIES FOR THEIR CANDIDATES

In *Colorado I*, the Court held that limits on "independent expenditures"[3] by political parties in national elections are unconstitutional. 518 U.S. 604 (1996). Four members of the Court would also have held that limits on "coordinated expenditures" made by a political party in support of its candidates violate the First Amendment.[4]

3. An expenditure made by a political party and that is not coordinated with a candidate or the candidate's campaign is an "independent" expenditure. 518 U.S. at 610 (Breyer, J., O'Connor, J., & Souter, J.).

4. Justice Kennedy, joined by The Chief Justice and Justice Scalia, supported this broader holding. 518 U.S. at 626 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part). Justice Thomas, also joined by the Chief Justice and Justice Scalia, supported this broader holding. 518 U.S. at 630 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part).

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, began his analysis of coordinated expenditures by noting the "central holding" of *Buckley v. Valeo*, 424 U.S. 1 (1976), "that spending money on one's own speech must be permitted . . . and this is what political parties do" when they make expenditures on behalf of their candidates. 518 U.S. at 627. As Justice Kennedy found

> We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election.

Id. at 630. Thus, Justice Kennedy would have held that "[p]arty spending 'in cooperation, consultation, or concert with' a candidate . . . is indistinguishable in substance from expenditures by the candidate or his campaign committee" that are protected by First Amendment. *Id.*

(Cont'd)

These two categories – independent expenditures and coordinated expenditures – encompass the full range of a party's support for its candidates. Political parties, like the MRP, do not make simple contributions to their candidates. As Justice Kennedy recognized, "in most cases" a "party's spending is made in cooperation, consultation, or concert with its candidate." *Colorado I*, 518 U.S. at 629 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) (internal quotation marks omitted). This cooperation and coordination is hardly surprising. The MRP, for example, believes that expenditures coordinated with its candidates are the most effective way to achieve the party's goals. Similarly, as the district court below held "[c]oordinated expenditures," unlike either independent expenditures or simple contributions, "provide the candidate and the party the optimum opportunity to communicate their message." *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1210 (D. Colo. 1999).

Some coordinated expenditures, nonetheless, may well be "virtually indistinguishable from simple contributions."[5] *Colorado I*, 518 U.S. at 624 (Breyer, J., O'Connor, J., & Souter, J.). Consider, as Justice Breyer has suggested, two alternative ways that a political party, in consultation and cooperation with its candidate, might decide to pay its candidate's media bills – "a donation of money" or "direct payment of a candidate's media bills." *Id.*

(Cont'd)
Justice Thomas, also joined by Chief Justice Rehnquist and Justice Scalia, offered a different, and equally compelling explanation why limits on coordinated expenditures violate the First Amendment. *Id.* at 644-48. Justice Thomas expressly found that the "anticorruption rationale" for campaign contribution limits "loses its force" if it is "[a]pplied in the specific context of campaign funding by political parties." *Id.* at 646 (citations omitted); *see id.* ("*What* could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes.").

5. Justice Breyer also noted that "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of contribution limits." 518 U.S. at 618.

The MRP, for example, could make a payment of $133,500 to its candidate for state auditor to purchase television time for a specific advertisement as discussed by the party with its candidate, or the party could make a direct payment of the same sum to television stations to purchase television time for the same advertisement. The first alternative – the MRP's "donation" or payment to its candidate – could easily be labeled a "contribution", and the second alternative – the party's "direct payment" of its candidate's media bills – could easily be labeled an "expenditure." Any distinction, however, between (1) passing the party's funds through a candidate's campaign committee to purchase television time and (2) purchasing television time directly for the same advertisement elevates form over substance.[6]

6. The Eighth Circuit held that cash payments made by the MRP to three of its 1998 candidates were "contributions as a matter of law" because the candidates had physical possession of the party's funds. *Lamb*, 213 F.3d 1071. The Court relied on the candidates' statements that "although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit." *Id.* There is, however, no real difference between a "contribution" of party funds to purchase campaign goods and services and a direct party "expenditure" to purchase the same goods and services. The MRP makes cash payments to its candidates for specific purposes determined by the party in consultation and cooperation with its candidates and their committees. Although candidates theoretically could spend the party's funds as they "see fit" because their committees have physical custody of the party's funds, the MRP has no need to make a contract with its candidates in order to ensure that the party's funds are spent as discussed and to achieve the party's goal of taking control of state government. The MRP, in short, can trust its candidates to use the party's funds as the candidate and the party have discussed.

There is no difference – much less a constitutionally significant difference – between cash "contributions" made by a political party in cooperation with its candidates and cash "expenditures" made by a political party in cooperation with its candidates.[7] As the Court has held, labels are not dispositive. *Colorado I*, 518 U.S. at 621-22 (Breyer, J., O'Connor, J., & Souter, J.) (FEC's characterization of party spending "cannot help the Government prove its case"; "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one"); *id.* at 627 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) ("as our cases hold, we cannot allow the Government's suggested labels to control our First Amendment analysis). Moreover, as the Tenth Circuit recognized correctly, "a simple cubbyholing of constitutional values under the labels 'contribution' and 'expenditure' cheapens the currency." *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1232 (10th Cir. 2000) (*Colorado Republican*).

II. LIMITS ON CASH "SPENT" BY POLITICAL PARTIES FOR THEIR CANDIDATES, AS WELL AS LIMITS ON POLITICAL PARTY "CONTRIBUTIONS", IMPOSE SUBSTANTIAL BURDENS ON POLITICAL SPEECH

Although some coordinated expenditures by political parties – donations or payments to its candidates – may be "virtually indistinguishable from simple contributions", a political party's financial support for its candidates is not the

7. The Federal Election Campaign Act confirms the fundamental point that political party expenditures and contributions are indistinguishable. As Justice Breyer noted in *Colorado I*, federal law treats contributions as the equivalent of expenditures: the FECA regulates political party *expenditures* in support of its candidates as an exception to otherwise applicable *contribution* limits. *See* 518 U.S. at 610-12 (Breyer, J., O'Connor, J., & Souter, J.).

same thing as a "contribution" made by an individual or a political action committee (PAC). A political party's spending "bears little resemblance to the contributions discussed in *Buckley* [424 U.S. 1 (1976)]." *Colorado I*, 518 U.S. at 629 (Kennedy, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part); *see id.* at 628-29 ("political party spending 'in cooperation, consultation, or concert with' a candidate does not fit within our description of 'contributions' in *Buckley*"). Courts "should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving . . . restrictions on political party spending."[8] *Id.* at 629.

As the Tenth Circuit held, "in the context of an election, a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties." *Colorado Republican*, 213 F.3d at 1227. Thus, in contrast to limits on individual or PAC contributions, which "bear 'more heavily on the associational right than on freedom to speak' " and which normally " 'entail[] only a marginal restriction' " on a contributor's speech, "a limit

8. These observations are well-taken. In *Buckley*, the Court upheld a $1000 limit on contributions by individuals and a $5000 limit on contributions by political committees, but it never had any occasion to address the application of these limits to political parties. *See Buckley*, 424 U.S. at 35-36, 58 n.66. Similarly, in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), the Court addressed limits on contributions made by individuals and PACs. The *Nixon* Court upheld Missouri's $1075 limit on individual and PAC contributions to candidates. *Nixon* did not address the issue in this case: limits on financial support provided by a political party to its candidates. In fact, the *Nixon* Court expressly recognized the important interests of an association, like a political party, in supporting its candidates: "an expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents,' " and, "thus[,] interfere[s] with the freedom of the adherents as well as the association." *Nixon*, 120 S. Ct. at 904 (*quoting Buckley*, 424 U.S. at 22).

upon the amount a [political] party can spend in coordination with its candidates certainly entails more than a 'marginal restriction' upon the party's free speech." *Id.* (*quoting Nixon*, 120 S. Ct. at 904 and *Buckley*, 424 U.S. at 20).

Similarly, the Court of the Appeals for the Eighth Circuit also recognized that a political party speaks through its candidates and that limits on a party's support for its candidates, even if that support is labeled a contribution, impose substantial burdens on the party's speech. *Lamb*, 227 F.3d at 1072. The Eighth Circuit specifically found that "a [political] party's contribution . . . cannot properly be called a 'contribution' in the same sense [as] the individual contributions at stake in *Buckley*." *Id.* The First Amendment rights at stake in the context of party contribution limits are "different from, and weightier than, those that were involved in *Buckley*." *Id.*

The Eighth Circuit recognized that the *Buckley* Court upheld limits on an individual's contributions because these limits imposed " 'only a marginal restriction upon the contributor's ability to engage in free communication.' " *Id.* (*quoting Buckley*, 424 U.S. at 20-21). In *Buckley*, the Court found that an individual's " 'contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support' " and that a limit on such contributions " 'involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution.' " *Id.* (*quoting Buckley*, 424 U.S. at 21).

The considerations that supported individual contribution limits in *Buckley*, however, "simply do not carry the same force when the contributor is a political party." *Id.* As the Eighth Circuit held,

> The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While

> political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.

Id.

Given "their unity of purpose, and the virtual identity of parties and their candidates,"[9] the Eighth Circuit found that "it is not easy to say, in the words of *Buckley* . . . that a political party's contribution 'does not communicate the underlying basis for the support.' " *Id.* (*quoting Buckley*, 424 U.S. at 21). Instead, "a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly be called a 'contribution' in the same sense that the individual contributions at stake in *Buckley* were." *Id.* Moreover, "a party's contribution to its candidate, again in the words of *Buckley* [is not] merely a 'symbolic expression' of support; it is more like a substantive political statement than others' contributions are." *Id.* (*quoting Buckley*, 424 U.S. at 21). Thus, "the first amendment rights

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9. The Eighth Circuit recognized that "there is [not] always an exact one-to-one correspondence between candidates and their parties." *Lamb*, 227 F.3d at 1072. Nonetheless, it found that:

> [P]arties seek to field a team and support it. Candidates are frequently, moreover, and with excellent reason, called their party's standard-bearers, and they make frequent appeal to party principle; and in their interactions, candidates and parties influence each other and become more alike, so as to present a coordinated and common front. They are often, in other words, virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities.

Id.

at stake [in limits on political party contributions] are different from, and weightier than, those that were involved in *Buckley*." *Id.*

III. THE GOVERNMENT DID NOT CARRY ITS BURDEN OF DEMONSTRATING THAT PARTY FINANCIAL SUPPORT CAUSES ANY REAL PROBLEM

Given the Tenth Circuit's determination that the federal limits on coordinated expenditures constitute "a 'significant interference' with the First Amendment rights of political parties", *Colorado Republican,* 213 F.3d at 1232 (*quoting Buckley*, 424 U.S. at 25 and omitting internal quotation marks and citations), it could have applied strict scrutiny.[10] The Tenth Circuit, however, held that it was not necessary to resolve "definitively" the level of scrutiny. *Id.* at 1227. Even under *Nixon*'s "deferential" standard of scrutiny of "contribution" limits, the federal limits on political party coordinated expenditures violate the First Amendment.[11] *Id.*

In *Nixon*, as the Tenth Circuit explained, this Court held that

> [U]nder *Buckley's* standard of scrutiny, a contribution limit involving "significant interference" with associational rights could survive if the Government demonstrated that contribution regulation was "closely drawn" to match a "sufficiently important interest," though

10. The district court applied strict scrutiny. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1208 (D. Colo. 1999) ("the FEC must demonstrate that the Party Expenditure Provision serves a compelling Government interest and is narrowly tailored. FEC carries a heavy burden of proof.").

11. The Court decided that it could apply the *Nixon* standard of scrutiny of "contribution" limits because "the FECA treats coordinated expenditures as 'contributions.' " *Colorado Republican*, 213 F.3d at 1226-27 (citation omitted); *see* note 7 *supra*.

> the dollar amount of the limit need not be "fine tun[ed]."

Colorado Republican, 213 F.3d at 1227 (*quoting Nixon*, 120 S. Ct. at 904). The government, however, had "not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process." *Id.* at 1233 (footnote omitted). Moreover, limits on the amount of financial support provided by political parties to their candidates are not the most appropriate and direct means of preventing individuals from circumventing limits on their own contributions to candidates. *See id.* at 1233. Thus, the federal "limit on party spending is not 'closely drawn' to the recognized governmental interest but instead constitutes an 'unnecessary abridgment' of First Amendment freedoms." *Id.* (*quoting Buckley*, 424 U.S. at 25) (footnote omitted).

Just as the Tenth Circuit found that the government could not justify the federal limits on coordinated expenditures, the Eighth Circuit also found that Missouri, even under *Nixon*'s deferential level of scrutiny, could not justify limits on political party "contributions." *Lamb*, 227 F.3d at 1072-73.

A. The Government Must Demonstrate That Political Party "Expenditures" Or "Contributions" Cause Some Real Problem

It is well-settled that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative Political Action Committee,* 470 U.S. 480, 496-97 (1985). It is equally well-settled that that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1888 (2000). Thus, the Tenth Circuit correctly held that the government

"must show that political parties through their spending authority corrupt or appear to corrupt the political process." *Colorado Republican*, 213 F.3d at 1227.

The Court, of course, has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon*, 120 S. Ct. at 907; *see City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1403 (2000) (Souter, J., concurring in part and dissenting in part) (same). Just as the Tenth Circuit required the government to justify limits on a political party's coordinated expenditures, this Court has required the government to demonstrate that there is a "real problem" when it regulates speech to protect children from exposure to indecent materials. *Playboy Entertainment Group*, 120 S. Ct. at 1891, 1893. The Court insisted that the government "must present more than anecdote and supposition." *Id.* at 1891. Similarly, even when government regulates commercial speech, it " 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* at 1888 (*quoting Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *see City of Erie v. Pap's A.M.*, 120 S. Ct. at 1403 (Souter, J., concurring in part and dissenting in part) ("application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue").

Nixon and *Buckley* do not excuse the government from its burden of showing that a political party's support for its candidates causes corruption or the appearance of corruption. In *Nixon*, the Court permitted the state to rely on *Buckley* for the proposition that a $1000 contribution made by an individual to a candidate may cause corruption or the appearance of corruption, and it excused the state from making any additional evidentiary showing. 120 S. Ct. at 906-08. *Buckley*, however, did not address any question about the validity of limits on the financial support provided by

a political party to its candidates. 424 U.S. at 58 n.66. Thus, *Nixon's* rejection of the state's duty to prove beyond *Buckley* that individual contributions cause corruption or the appearance of corruption simply does not address the separate, distinct question in this case: whether the financial support provided by a political party to its candidates causes either corruption or the appearance of corruption. Indeed, as the Tenth Circuit recognized, "[t]o encompass political parties within the *Buckley* language on corruption would require a real extension of this precedent," and "[s]uch an extension is not warranted by the Court's post-*Buckley* FECA jurisprudence and would betray the historic importance of political parties." *Colorado Republican*, 213 F.3d at 1232.

B. There Is No Showing That Party Support Causes Corruption Or The Appearance Of Corruption

The Tenth Circuit expressly found that the government had "not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process." *Id.* at 1233 (footnote omitted). The government now claims simply that "it is reasonable to assume that large coordinated expenditures by political parties, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office." Pet. Br. 23. The government is mistaken.

It is not "reasonable to assume" that a political party's coordinated expenditures (or contributions) are "like large campaign contributions generally." As the Courts of Appeals for both the Tenth and Eighth Circuit held, political party expenditures (or contributions) and individual contributions are not the same. *Colorado Republican*, 213 F.3d at 1227; *Lamb*, 227 F.3d at 1072. Moreover, limits on the amount of financial support provided by a political party to its candidate have "weightier effects" on First Amendment interests than limits on individual contributions. *Lamb*, 227 F.3d at 1072.

It is not "reasonable to assume" that a political party's influence over its candidates creates corruption or the appearance of corruption. Even if *Nixon* broadened the definition of corruption to include some amorphous notion of "improper influence", it does not follow that the effective use of party resources to induce party loyalty is in any sense "improper." *See* Pet. Br. 23. As, for example, Justice Thomas has noted, "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Colorado I*, 518 U.S. at 646 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part).

Although the government asserts that the court of appeals "underestimate[d] the potential for abuse", Pet. Br. 24, it "must present more than anecdote and supposition" that political party expenditures or contributions cause corruption or the appearance of corruption. *Playboy Entertainment Group*, 120 S. Ct. at 1891. When vital First Amendment interests are significantly burdened, the government must demonstrate that there is a "real problem." *Id.* at 1891, 1893. The Court, of course, can only be confident that there is a "real problem" if the government presents some objective evidence. *See Microsoft Corporation v. United States*, 121 S. Ct. 25, 26 (2000) (Rehnquist, C.J.) (inquiry into the appearance of impartiality is "an objective one" and must be "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances"). Here, however, the government cannot point to any evidence that money "spent" by political parties for their candidates or money "contributed" by political parties to their candidates causes corruption. The government cannot point to any evidence even of an appearance of corruption.

Just as the government failed to demonstrate that a political party's coordinated expenditures cause corruption or the appearance of corruption, Missouri failed to demonstrate that a political party's "contributions" cause any "real problem."

The Eighth Circuit expressly recognized this Court's determination in *Nixon* that "the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " 227 F.3d 1073 (*quoting Nixon*, 120 S. Ct. at 906). Here, however, the justification – "the threat that a political party will corrupt a candidate" – is "novel and not particularly plausible." *Id.* Missouri, in any event, had no evidence that a political party's "contributions" cause corruption or the appearance of corruption. *Id.* ("the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented").

C. Limits On A Political Party's Speech Are Not Closely Drawn To Prevent Circumvention Of Limits On An Individual's Contributions

The government argues that preventing circumvention of limits on individual contributions justifies limiting the size of a political party's coordinated expenditures or contributions. *See* Pet. Br. 25-32. This rationale fares no better than its anti-corruption rationale.

The Court, of course, has recognized that certain contribution limits work to protect the integrity of other contribution limits. In *Buckley*, for example, the Court upheld a $25,000 limit on total individual contributions *to* federal candidates, national party committees and other political committees on the ground of preventing evasion of the federal $1000 limit on individual contributions to candidates.[12]

12. Individual members of the Court have also suggested that Congress could limit the amount of individual contributions *to* a political party. *Colorado Republican*, 518 U.S. at 617 (Breyer, J., O'Connor, J., & Souter, J); *California Medical Association v. FEC*, 453 U.S. 182, 197-99 (1981) (plurality opinion) (risk of evasion of limits on contributions to candidates justified limit on contributions *to* political action committees).

Buckley, 424 U.S. at 38. *Buckley*, however, does not provide any authority for limiting the size of contributions or coordinated expenditures made *by* political parties to their candidates.

As the Eighth Circuit has explained, *Buckley* "upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate."[13] *Lamb*, 227 F.3d at 1073 (*citing Buckley*, 424 U.S. at 38). In the case of both Missouri's "contribution" limit and the federal limit on coordinated expenditures, "the challenged restriction is on the party's giving, and the [government] seek[s] to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving." *Id.* As the Eighth Circuit held, imposing "burdens [on] the free speech rights of political parties in order to control the activities of someone else [an individual contributor]" is "something quite different from what *Buckley* approved." *Id.*

Buckley at most supports the government's power to limit individual contributions *to* a political party as a means of preventing evasion of limits on individual contributions to candidates. Although there is some very limited authority upholding limits on "contributions" made *by* a political party,[14] the Court has never held, much less even suggested,

13. *Buckley* upheld "an overall $25,000 limitation on total contributions by an individual during any calendar year" because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38.

14. The Alaska Supreme Court upheld $5000 to $100,000 limits on political party "contributions" to candidates, but it did so in a very cursory fashion. *Alaska v. Alaska Civil Liberties Union*, 978 (Cont'd)

that limits on the financial support provided *by* a political party to its candidates are a constitutionally valid means of preventing evasion of a limit on individual contributions. In fact, quite to the contrary, when Justice Breyer suggested the possibility of limits on contributions *to* a political party as a means of preventing evasion of individual contribution limits, he also recognized that limits on spending by a political party would impose a "markedly greater burden."[15] *Colorado I*, 518 U.S. at 617 (Breyer, J., O'Connor, J., & Souter, J.) (internal quotation marks and citation omitted).

Even if, as the government suggests, some individuals attempt to circumvent limits on individual contributions to candidates by making contributions to political parties that are "tallied" or "earmarked" for particular candidates (Pet. Br. 26-31), there is no reason to limit political parties' freedom of speech. As both the Tenth and Eighth Circuit recognized, there are more appropriate and direct – that is –

(Cont'd)
P.2d 597, 625-26 (1999), *cert. denied,* 120 S. Ct. 1156 (2000). Two federal district courts have also considered state law limits on political party contributions to their candidates. One court upheld Colorado's $10,000 to $400,000 limits on political parties' "contributions" to candidates, *Citizens for Responsible Government State Political Action Committee v. Buckley*, 60 F. Supp. 2d 1066, 1093-97 (D. Colo. 1999), but the Colorado legislature subsequently repealed these limits. 2000 Colo. Legis. Serv. Ch. 36, § 12 (H.B. 1194, Mar. 15, 2000) (West). Although the other court approved limits on party contributions to candidates in principle, it held that the particular $200, $300, and $400 limits were "too low to pass constitutional muster." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 484-87 (D. Vt. 2000).

15. Limits on the total amount that an individual can contribute *to* a political party may reduce the total amount of the financial resources available to the party; limits on coordinated expenditures or contributions restrict the party's ability to target these limited resources to candidates whose electoral success is necessary for the party to achieve its goal of taking control of government.

more "closely drawn" – means of preventing individuals from circumventing limits on their own contributions to candidates. *See Colorado Republican*, 213 F.3d at 1232; *Lamb*, 227 F.3d at 1073.

Both federal law and state law "already have a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." *Lamb*, 227 F.3d at 1073. As the Tenth Circuit explained, under federal law and regulations, individual contributions that are in any way "earmarked" for a particular federal candidate are subject to the limit on individual contributions to that candidate. *Colorado Republican*, 213 F.3d at 1232. Similarly, as the Eighth Circuit explained, "it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum" and any such "earmarked" contribution would be subject to the limits on individual contributions. *Lamb*, 227 F.3d at 1073. Thus, as the Tenth Circuit held, "[v]igilant enforcement" of the limits on individual contributions, "rather than a severe abridgement of party speech, is a more appropriate and direct means to safeguard the integrity of . . . individual contribution limits."[16] *Colorado Republican*, 213 F.3d at 1232.

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16. The government, nonetheless, suggests that "the earmarking provision [of federal law] does not provide a complete response to the danger that contributions to political committees may be used to evade the FECA limits on [individual] contributions to candidates." Pet. Br. 29. This suggestion is not well-taken. The government has not made any showing either that it has tried to enforce the earmarking provisions or that enforcement has not been effective. *See Playboy Entertainment Group*, 120 S. Ct. at 1888 ("[w]hen a plausible, less restrictive alternative is offered to a content-based restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals").

(Cont'd)

CONCLUSION

The judgment of the court of appeals should be affirmed.

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(Cont'd)

As the Eighth Circuit recognized, "[l]imitations on party spending might have an indirect attenuating effect on secret 'earmarking' agreements between individuals and political parties because such agreements may be hard to detect and police directly." *Lamb*, 227 F.3d 1073. Absent any showing that efforts to enforce limits on individual contributions have been ineffective, this rationale, however, is "too frail . . . to justify burdening the substantial free speech rights of political parties" that are jeopardized by limits on contributions to their candidates. *Id.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

FEDERAL ELECTION COMMISSION,

Petitioner,

—v.—

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF COLORADO IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Colorado is one of its statewide affiliates.

Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions to defend the right of individuals and groups to engage in political expression without regard to party affiliation or partisan interest. More specifically, because of our belief in the primacy of political speech, the ACLU has consistently opposed efforts to limit speech as a means of addressing perceived inequalities in the electoral system. Based on that view, the New York Civil Liberties Union challenged the constitutionality of key provisions of the Federal Election Campaign Act (FECA) as one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976). The ACLU has also opposed such efforts to limit speech by participating as *amicus curiae* in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), as well as many other cases, including *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. __, 120 S.Ct. 897 (2000); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *Meyer v. Grant*, 486 U.S. 414 (1988); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); and *California Medical Association v.*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

FEC, 453 U.S. 182 (1981). In addition, the ACLU has represented various groups and individuals, of all ideological persuasions, whose political advocacy has been prohibited, restricted or inhibited by campaign finance laws. *See, e.g.*, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

In our view, this case represents yet another well-intentioned but misguided effort to limit the First Amendment right of political parties to work with their candidates in pursuit of a common political agenda. Such activity lies at the very core of what political parties exist to do, while the risk that a party may corrupt its own candidate, whatever that may mean, is minimal at best. Furthermore, the stabilizing role that political parties have traditionally played in the American political system will be further diminished if parties are barred from coordinating their strategy, and hence their expenditures, with candidates who are running under a party banner. *Amici* therefore respectfully urge the Court to affirm the judgment of the Tenth Circuit below.

STATEMENT OF THE CASE

This case comes back to the Court following a remand from its earlier decision in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996)(hereinafter *Colorado I*). In that case, which arose out of an FEC enforcement action, the Court held that independent expenditures by a political party could not be regulated as contributions by irrebuttably presuming that such expenditures are coordinated with the candidate on whose behalf they were made. Speaking for a plurality of the Court, Justice Breyer concluded that FECA's restrictions on independent party expenditures impinged on "'core' First Amendment activity." *Id.* at 616. The plurality further distinguished the restriction on independent party expenditures

from the individual contribution limits upheld in *Buckley* by noting that the government failed to "point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures." *Id.* at 618. By a 7-2 vote, the Court then held that the limits on independent party expenditures were unconstitutional.

The issue now before the Court involves the constitutionality of government efforts to restrict campaign expenditures by a political party that the party in fact coordinates with its chosen candidate. Although that issue had been before the Court in *Colorado I*, the Court declined to consider it for "prudential" reasons. *Id.* at 623. In particular, the Court found that the issue of coordinated party expenditures had not been fully developed in the lower courts, either factually or legally, and accordingly sent the case back for further proceedings.[2]

Four Justices in *Colorado I* would have reached the broader issue and enjoined enforcement of the party expenditure provision on the ground that the anti-corruption rationale on which the Court has relied in its campaign finance decisions is inapplicable where a party spends its lawfully obtained contributions to support the positions of its own

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[2] Coordinated expenditures undertaken by individuals, as well as those by political associations other than political parties, are treated strictly as contributions under federal law and subject to the same limits as direct contributions. 2 U.S.C. §441a(a)(7)(B)(I). *See Colorado I*, 518 U.S. at 610. The separate statutory provision at issue in this case governs coordinated expenditures by political parties and permits expenditures which exceed the amount the party would otherwise be permitted to contribute to a candidate directly. §441a(d)(3). For senatorial campaigns, that provision fixes the expenditures cap at the greater of $20,000 or 2 cents multiplied by the voting age population of the state, as indexed for inflation. In 1998, the average amount expended by the national committee in a senate election ranged from a low of $130,000 in Alaska to a high of $3,035,874 in California, according to FEC data.

candidate, whether or not that expenditure is made in concert with the candidate. *Colorado I*, 518 U.S. at 626-31, 631-48 (opinions of Kennedy and Thomas JJ., concurring in judgment and dissenting in part). The consensus view of the concurring Justices was that parties and candidates have traditionally worked together to achieve their common goals and, when they engage in that work, there is no risk to the integrity of our political system. To the contrary, the danger to it lies in government suppression of such activity. *Id.*

Two Justices in dissent maintained that Congress was within its power to regulate all party spending -- including independent expenditures. *Colorado I*, 518 U.S. at 648-50 (Stevens, J., dissenting). In reaching this conclusion, the dissent agreed with the assessment of the plurality and concurring opinions that "[a] party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked." *Id.* at 648. Unlike the other Justices, however, the dissenting Justices believed that the influence this interdependency leads to is illegitimate. *See id.*

On remand, both sides offered submissions on the question of whether coordinated expenditures by political parties resulted in corruption or the appearance of corruption. *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 41 F.Supp.2d 1197 (D. Colo. 1999). Based on that evidence, the district court granted summary judgment in favor of the Colorado Republican Party. *Id.* at 1214. The district court began its analysis by acknowledging the point about which there was broad agreement among the *Colorado I* opinions -- that there is an intimate, interdependent relationship between political parties and their candidates. *Id.* at 1209-10. Because of this well-established feature of American politics, the district court concluded that "communications via coordinatcd party expenditures implicate core First Amendment concerns." *Id.* at 1210.

Turning to the question of corruption, the court then held that "the FEC . . . failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof." *Id.* at 1213. Rejecting the argument that contributors to parties would force the party committee to compel a candidate to take a political position, the court noted that most of the FEC's allegations concerned soft-money contributions, which may not be used for coordinated expenditures. *Id.* at 1204 n.7, 1211. Examining the effect of hard money contributions, the court concluded that "[t]he evidence in the record . . . demonstrates that at least the majority of hard money received by the parties is in the form of small (*i.e.*, less than $100) contributions from individual donors." *Id.* at 1202. And even with respect to large party donors, the court held, the "facts in the record" demonstrated that the limits on hard money contributions make "contributor-to-party-to-candidate pressure . . . an unlikely avenue of corruption." *Id.* at 1211. Moreover, like the concurring opinions in *Colorado I*, the court concluded that the relationship between parties and their candidates made corruption by the party itself, rather than by a party donor, a practical impossibility. *Id.* at 1212. Because the district court concluded on the facts that coordinated expenditures by political parties did not lead to corruption or the appearance thereof, it held that the First Amendment prohibited restrictions on such expenditures.

The Tenth Circuit affirmed in an opinion which strictly adhered to *Buckley* and its progeny, *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221 (2000), and which specifically incorporated this Court's recent decision in *Nixon v. Shrink Missouri Gov't PAC*, 120 S.Ct. 897 (2000). The court of appeals concluded that §441a(d)(3) does not satisfy the standard consistently applied by this Court, which establishes that the

only acceptable justifications for limits on campaign contributions to a candidate are corruption or the appearance of corruption. Adopting the view already expressed by four Justices of this Court, the court of appeals rejected the notion that any influence a political party exercises over its candidate through coordinated spending decisions involves such corruption or represents a subversion of the political process. *Id.* at 1231, 1233.

Noting at the outset that FECA treats coordinated expenditures as contributions, *see Federal Election Comm. v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985), the court of appeals cast the issue as one involving contributions and set out to decide whether the regulation of coordinated party expenditures was "closely drawn" to match a "sufficiently important interest," *Shrink*, 120 S.Ct. at 904 (quoting *Buckley*, 424 U.S. at 25, 30). The court admitted some difficulty in applying the *Buckley* standard governing contribution limits for the reasons expressed in Justices Kennedy's and Thomas' concurring opinions in *Colorado I*, 518 U.S. 604,[3] but held that the party expenditure provision failed even the more deferential standard established in *Buckley* and restated in *Shrink Missouri*.

Applying the standard for evaluating contribution limits, the court of appeals considered and rejected each of the FEC's arguments advanced in support of the expenditure provision. The FEC first argued that contributors to a political party -- wealthy individuals or political action committees -- can unduly influence a political party and thereby corrupt the political process. The Tenth Circuit acknowledged that corporations and others may indeed exert influence over the legislative process, but the FEC's evidence failed to demonstrate that *parties* undermined the integrity of the electoral process. *Id.* at 1229. The court observed that Congress recognized the danger of corporate influence by adopting contribution limits in the first place, but stated that if the FEC finds the current limits on corporate contributions inadequate to curb undue influence, it should make its case to Congress. "We will not validate limits on the protected speech of a political party as a back-door means of stemming corporate involvement in the legislative process." *Id.*

The FEC additionally maintained that parties can be a corrupting influence because they raise millions of dollars in "soft money" from corporations, unions, and other interests. Party leaders then pressure lawmakers to go along with policies supported by those contributors, the commission argued. In response, the Tenth Circuit noted that FECA regulates only "hard money," and that the influence of soft money is in any event irrelevant to the present controversy because coordinated party expenditures can only be funded by hard money contributions. "We appreciate the FEC's concern over soft money, but this proceeding does not present the opportunity for soft money reform." *Id.* at 1230.

The FEC's second theory -- that a cap on coordinated expenditures keeps party officials from using the party's spending authority to further their own interests -- "has the appeal of directly targeting the source of alleged corruption," the court acknowledged. But the underlying premise "gravely misunderstands the role of political parties in our democracy." Political parties are "simply too large and too diverse to be corrupted by any one faction," the court stated. *Id.* at 1231.

Finally, the FEC argued that the party expenditure provision prevents evasion of FECA's other contribution limits.

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[3] As the court of appeals explained, "a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1227.

The court of appeals agreed that an individual's channeling of money to a specified candidate through the party would threaten the integrity of the individual contribution limits. However, it held that Congress took care of this possibility by treating such earmarked contributions as going directly to the candidate. *Id.* at 1232.

The court concluded that §441a(d)(3) impermissibly interferes with political parties' First Amendment rights and is not "closely drawn" to address corruption in the political process. *Buckley* concerned limits on contributions by individuals, candidates, and PACs and said nothing about the First Amendment implications of limiting party speech on behalf of its candidates, the Court said. *Id.* at 1232-33. To bring political parties into the corruption framework would require an extension of precedent that is "not warranted by the [Supreme] Court's post-*Buckley* FECA jurisprudence and would betray the historical importance of political parties." *Id.* at 1232.

SUMMARY OF ARGUMENT

This case presents an important but limited issue. The question before the Court is whether the First Amendment prohibits restrictions on expenditures by political parties made in coordination with their candidates. This is not a case about soft money. Under FECA, coordinated expenditures by political parties may be made only with hard money, and the parties have neither challenged the use restrictions on soft money nor presented any evidence suggesting that soft money is in fact used by political parties for coordinated spending. Moreover, this is not a case about other hard money restrictions contained in FECA -- such as the limits on direct contributions by individuals to parties, or by parties to candidates. In the past, this Court has stressed the need to proceed cautiously and focus on the narrow issue at hand when addressing the constitutionality of a specific campaign finance regulation. *See Shrink*, 120 S.Ct. at 909; *Colorado I*, 518 U.S. at 623-26 (plurality opinion). We urge the Court to do so again here.

Even still, it is difficult to fit the limitation on coordinated spending by political parties into the conceptual categories set forth in *Buckley*. But, like the court of appeals, we do not believe it is necessary to resolve that conundrum in order to resolve this appeal. In *Buckley*, the Court upheld the contribution limitation at issue only because it left political "communication significantly unimpaired," *Shrink*, 120 S.Ct. at 904 (discussing *Buckley*, 424 U.S. at 20-21), and furthered the government's compelling interest in preventing corruption, *see Buckley*, 424 U.S. at 25-29. The coordinated party expenditure limit at issue in this case does neither.

First, unlike the contribution limits considered in *Buckley*, the limit on coordinated party expenditures plainly implicates core First Amendment values. As this Court has recognized, political parties play a unique role in the American political system. They provide stability to the democratic process and a collective voice for party members. In our pluralistic society, the major political parties necessarily embrace a broad political spectrum. But they also represent a distinct set of political beliefs. A party communicates those beliefs in at least two closely related ways: by selecting and supporting candidates who reflect the party's views, and by relying on those candidates, as standard bearers, to speak for the party. Preventing a party from coordinating its spending with its candidates both infringes on the ability of that party to support its candidates and stifles its ability to use its candidates to communicate the party's message.

Second, imposing a limit on coordinated party expenditures does nothing to further the government's recognized

interest in preventing corruption or the appearance of corruption. In our democratic system, there is nothing corrupting about party expenditures designed to help a candidate spread the party's message as its standard bearer. Nor is there anything improper about attempts by the party to shape the candidate's views to the extent that the candidate's views may differ from the party platform. What the government characterizes as corruption is nothing more than party politics. Only last Term, this Court reaffirmed the right of political parties to select their own candidates unhampered by government efforts to shape those ideological choices. *See California Democratic Party v. Jones*, 530 U.S. __, 120 S.Ct. 2402 (2000). Once having made those choices, the parties should be equally free to decide whether the electoral chances of their candidate would be better enhanced by independent expenditures or coordinated expenditures. That, and nothing more, is what is at issue in this case.

The substantial record evidence developed on remand contradicts the government's contention that party donors corrupt candidates by forcing the parties to utilize coordinated party expenditures to induce candidates to support the interests of those large donors. The bulk of hard money raised by political parties -- the only money that may be used for coordinated spending -- is received in very small amounts, averaging less than $40. Moreover, there is no evidence suggesting that larger donors, who may give up to $20,000 in hard money, have been able to use those hard money contributions to exert improper contributor-to-party-to-candidate pressure. Even if the FEC believes that such improper pressure exists, it may not restrict speech by political parties as a back-door means of correcting a perceived problem related to the federal limits on the money that an individual or PAC may contribute to a party.

As the Solicitor General aptly points out, Congress enacted §441a(d) in order to "limit the role of [political] parties vis-a-vis other participants in ongoing public policy debates." Pet. Br. at 16. The First Amendment simply does not permit Congress to level the playing field of political debate in this manner. *See Buckley*, 424 U.S. at 48-49.

ARGUMENT

PARTY COORDINATED EXPENDITURES MAY NOT BE RESTRICTED CONSISTENT WITH THE FIRST AMENDMENT

Since *Buckley v. Valeo*, 424 U.S. 1 (1976), every campaign finance case has begun by characterizing the challenged regulation as either a contribution or expenditure. Limits on expenditures have been generally struck down. Limits on contributions have been upheld only if they plausibly advance the recognized interest in preventing corruption or the appearance of corruption.

The basis for this distinction was set forth in *Buckley*. "[R]estrictions on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their explanation, and the size of the audience realized." *Id.* at 19. By contrast, the Court wrote in *Buckley*, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 20.

As the Tenth Circuit recognized, this case does not fit comfortably within that conceptual model. To be sure, coordinated expenditures are generally treated like contributions under the campaign finance laws. *See* n.2, *supra*. But the justification for subjecting contributions to greater regu-

lation than expenditures -- that contributions represent only symbolic expression or, alternatively, a form of speech by proxy -- fails to capture the unique and undeniable relationship between a candidate and its party.

Both on the ballot and in the public mind, a candidate speaks for the party and the party speaks through its candidate. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989). That is not to say that a party and its candidate must see eye-to-eye on every issue; they rarely do. The country is too complex and our political parties are too diverse to expect or require a total identity of interests. Nevertheless, parties are unlike other interest groups and unlike other political associations that may develop around particular ideologies or causes. The purpose of a political party is to elect candidates, and candidates rely on political parties to help them get elected. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). In a very real sense, therefore, the message of a political party is most clearly expressed by the candidates it selects to run under its banner. For a political party, the candidate is the message, and support for the candidate is the way in which the party communicates its beliefs.

Thus, if this Court feels compelled by its jurisprudence to characterize coordinated party expenditures as either a contribution or an expenditure, we believe the expenditure label is the more appropriate one since any restriction on coordinated party expenditures directly affects the traditional ability of the party to communicate is own chosen message through its own chosen medium. In our view, however, this case should not be decided by labels. Rather, we think the case should be decided by asking two fundamental questions. First, do the limits on coordinated party expenditures impair substantial speech and associational interests? If so, has the government demonstrated on these facts a sufficient risk of corruption to justify the abridgment of First Amend-

ment rights? We respectfully submit that the answer to both questions is clear, and that the Tenth Circuit properly struck down the challenged restrictions as unconstitutional on the record before it.

A. The Challenged Limits On Coordinated Expenditures By Political Parties Impair Substantial Rights Of Free Speech And Association

In *Buckley*, this Court concluded that an individual contribution limitation constitutes "only a marginal restriction upon the contributor's ability to engage in free communication" because it "involves little direct restraint on . . . political communication" and "permits the symbolic expression . . . evidenced by a contribution." 424 U.S. at 20-21. As the court of appeals correctly held in this case, however, "a limit upon the amount a party can spend in coordination with its candidates certainly entails more than a 'marginal restriction' on the party's free speech." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d. at 1227 .

The two principal reasons that the *Buckley* Court concluded that individual contribution limits "entail[] only a marginal restriction" on speech do not apply to coordinated expenditures by parties. 424 U.S. at 20. The Court's evaluation of the speech interest affected by individual contribution limits turned crucially on its conclusion that an individual's contribution to a candidate constitutes only a "symbolic expression" of support. *Id.* at 21. As Justice Kennedy noted in *Colorado I*, however, "[p]arty spending 'in cooperation, consultation, or concert with' its candidates of necessity 'communicate[s] the underlying basis for the support,' *i.e.*, the hope that he or she will be elected and will work to further the party's political agenda." 518 U.S. at 629-30 (Kennedy, J., concurring in the judgment and dissenting in part)(citing *Buckley*, 424 U.S. at 21); *cf. Missouri Republi-*

can Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000)(holding that even a party contribution amounts to more than the symbolic expression of an individual contribution). In other words, coordinated spending provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not.

Nor does the *Buckley* Court's reasoning that "the transformation of contributions into political debate involves speech by someone other than the contributor" apply in any meaningful way to party coordinated spending. 424 U.S. at 21. Unlike contributions, "a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily" represents a direct and substantial restraint on that person or group's speech. *Id.* at 19. And while a party's decision to coordinate its spending on political communication with its candidate may change the quality of that communication to some degree, the "practical identity of interests between the two entities" makes clear that coordinated expenditures are much more than proxy speech. *Colorado I*, 518 U.S. at 630 (opinion of Kennedy, J.)

Political parties hold a venerable place in American politics. *See generally California Democratic Party v. Jones*, 120 S.Ct. 2402. One reason that political parties hold such an "important and legitimate role . . . in American elections," *Colorado I*, 518 U.S. at 618 (plurality opinion), is that they serve to promote core First Amendment values. "The First Amendment embodies a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs." *Id.* at 629 (Kennedy, J., concurring in the judgment and dissenting in part)(citations and internal quotation marks omitted).

The party coordinated expenditure limitation undeniably hampers the ability of parties to support their chosen candidates. After all, "it would be impractical and imprudent, to say the least, for a party to support its candidates without some form of 'cooperation' or 'consultation.'" *Id.* at 630. Uncoordinated spending might well be counterproductive. Moreover, without coordinated spending it becomes much more difficult for parties to use their resources to have their candidates, as standard bearers, speak for them. The ultimate effect of these restraints is that the limitation on coordinated party spending interferes with the ability of parties to promote their members' shared political beliefs. As a consequence, it also undermines the traditional role of political parties in fostering robust political debate.

B. Party Coordinated Expenditures Present No Threat Of Actual Or Perceived Corruption

In addition to interfering with more substantial speech interests than those affected by the contribution limit in *Buckley*, §441a(d)(3) fails entirely to advance the only interest that this Court recognized in *Buckley* as sufficiently compelling to justify that contribution limit -- the prevention of corruption or the appearance of corruption. *See Buckley*, 424 U.S. at 25-29, 48-49; *Shrink*, 120 S.Ct. at 905; *Colorado I*, 518 U.S. at 609. For as the Tenth Circuit held and several members of this Court have concluded, party coordinated expenditures present no real possibility of corruption. *See Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1229-33; *Colorado I*, 518 U.S. 604 (Kennedy, J., and Thomas, J., concurring in the judgment and dissenting in part).

Indeed, the very notion of a party corrupting its candidate through coordinated support is both politically and le-

gally incoherent.[4] In order for an entity to influence a candidate impermissibly, either through *quid pro quo* corruption or through the more subtle forms of improper influence discussed in *Shrink*, the candidate and the entity must have interests that are separate and distinct. If their interests are aligned, there will be no loyalty to purchase and no favors to seek. That is the situation here. As Justice Kennedy wrote in *Colorado I*, there is a "practical identity of interests" between candidates and their parties. 518 U.S. at 630; *see also id.* at 631-48 (opinion of Thomas, J.). Even the government itself argued explicitly in *Colorado I* that there is a clear identity of interests between a political party and its candidates; it went so far as to state that "a party and its candidate are identical." *See id.* at 622 (plurality opinion) (setting forth the government's position). Accepting the government's view, this close alignment of interests surely undermines the likelihood of corruption, whatever that may mean in the context of a party and its candidate.

The government's failure to articulate any persuasive explanation of the sort of "corruption" it fears in communications between a party and its candidate exposes the constitutional flaw at the heart of its case. To the extent that a candidate and party's interests do differ, there is nothing improper about the party attempting to influence the candidate's positions. Far from constituting corruption, such efforts at influence are both commonplace and appropriate. *See Ray v. Blair*, 343 U.S. 214 (1952)(a party may require its candidates for the electoral college, as a *quid pro quo* for the party's nomination as an elector, to pledge to vote automatically for whatever presidential ticket the party ultimately nominates).

As discussed above, political parties in America have traditionally operated as vehicles to communicate and implement the shared political beliefs of their members. Parties accomplish both of these goals in large part by selecting and supporting candidates to serve as standard bearers for the party.[5] Once elected, these candidates are expected to fulfill their role as a selected standard bearer by working to advance the party's agenda through legislation or executive branch action. For this reason, it makes little sense to view a party's urging its own candidate to adhere to the party agenda as a form of "improper" influence. Indeed, it is precisely through such activity that parties are able to represent and promote their members' shared political beliefs. If they could not promote those shared beliefs effectively, political parties would quickly risk marginalization. That result would neither reduce corruption nor promote good government. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 106-07 (1990)(Scalia, J., dissenting)(discussing the traditional role of political parties in furthering the will of broad and inclusive majorities); *see also California Democratic Party v. Jones*, 120 S.Ct. 2402.

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[4] In addition to contending that there is a danger that a candidate will be corrupted by his or her party, the government asserts that §441a(d)(3) is constitutional because it is necessary to prevent the possibility of corruption by the individual party leaders who control the expenditure of party funds. The government, however, points to no evidence even suggesting that there is any real threat of such corruption. *See* Gov't Br. at 33-34. Even were there a danger of party leaders subverting the will of party members, the Tenth Circuit held that there is no evidence that rank-and-file members will not quickly replace corrupt leaders. *See Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1231.

[5] As discussed in Point I, *supra*, coordinated party spending simply reflects the party's support of its standard bearer as a candidate. To be sure, a successful candidate is likely to use her power as an elected official to implement her party's platform. But in our system, it is assumed that he or she will do so regardless of how much or how little the party spends to promote the candidate's election. The government has introduced no evidence to the contrary.

This close relationship between parties and their candidates reveals yet another serious difficulty associated with the government's argument. Were this Court to hold that Congress may regulate coordinated expenditures by parties, the combination of that holding and the holding in *Colorado I* would force lower courts to make the difficult determination whether particular party expenditures are in fact coordinated with candidates. Because parties and their candidates are so closely linked, such an inquiry may be a practical impossibility. Even if such an inquiry is feasible, it inevitably would involve an intrusive and constitutionally troubling investigation of the inner workings of political parties.

In addition to arguing that candidates may be corrupted by their parties, the government asserts that the limit on coordinated party spending must be upheld to prevent large hard money contributors from exercising undue influence on the party's spending decisions. The record indicates otherwise. As the court of appeals noted, coordinated expenditures must be supported by hard money and the hard money raised by the parties comes from individuals who give, on average, less than $40. *Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1231. Even with respect to the small percentage of donors who give substantially more, and whose contributions are subject to the disclosure requirements, the record belies the government's contentions. Rather than suggesting that parties funnel money to candidates at the behest of large donors seeking influence, the evidence indicates "that the primary consideration in allocating funds is which races are marginal -- that is, which races are ones where party money could be the difference between winning and losing." *Colorado Republican Fed. Campaign Comm.*, 41 F.Supp.2d at 1203.

Perhaps because of the absence of evidence supporting its position, much of the evidence introduced by the government in the district court apparently related to unregulated

soft-money contributions to political parties. But this is not a case about soft money contributions or any other aspect of campaign finance law. Thus, the simple fact that "[n]one of the FEC's examples [concerning alleged donor corruption] involve coordinated expenditures" is fatal to the government's argument. *Id.* at 1211.

In an attempt to skirt the absence of any evidence that donors use hard money contributions to parties to force parties to use coordinated expenditures to exert improper pressure on candidates, the government argues that the party expenditure provision should be upheld to prevent donors from evading FECA's individual contribution limits. It is true that while an individual may contribute only $1000 directly to the candidate for federal office, *see* 2 U.S.C. §441a(a)(1)(A), he or she may contribute up to $20,000 of hard money to a national political party, *see* §441a(a)(1)(B). The FEC claims that if the coordinated spending limit is struck down, individuals will circumvent the $1000 limit by contributing $20,000 to a political party with the expectation that this money be used to support a particular candidate. But as the government is forced to acknowledge, Congress anticipated such circumvention and included a specific provision in FECA -- §441a(a)(8) -- to prevent it. That section directly prohibits evasion of the candidate contribution limits by prohibiting "pass through" contributions -- that is, contributions to a party that are earmarked, either formally or informally, for a particular candidate. Consistent with the First Amendment's requirement that government take care not to infringe speech rights unnecessarily or excessively, it is plain that "[v]igilant enforcement of §441a(a)(8), rather than severe abridgement of party speech, is a more appropriate and direct means to safeguard the integrity of the individual contribution limits." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d. at 1232.

The government suggests that the prohibition on ear-

marking is not sufficient to prevent donors from circumventing the individual contribution limits. *See* Gov't Br. at 31 n.14. But while the government's contention may support the Court's conclusion that other contribution limits are necessary to prevent individuals from circumventing the limits on the amount that they may give to any one candidate, *see Buckley*, 424 U.S. at 38 (holding that the $25,000 aggregate limits on contributions by individuals prevents "huge contributions" of hard money to the candidate's political party); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. at 193-99 ($5,000 limit on contributions to PACs), it does nothing to demonstrate that a limitation on party expenditures is also necessary to prevent such evasion. The government bears the burden of proof on this point, but it has introduced no evidence that these other mechanisms are insufficient.

Moreover, even were there evidence that the $25,000 aggregate limit or the $20,000 limit on contributions to parties by individuals permitted circumvention of the $1,000 individual-to-candidate limit, such evidence would suggest at most that Congress may constitutionally lower these other contribution limits.[6] Congress, however, has chosen not to do so. While Congress may be entitled to deference when it fine-tunes contribution limits, *see, e.g., Shrink*, 120 S.Ct. 897, the Court need not and should not defer to a congressional judgment that burdens a substantial speech interest of political parties as a back door means of stemming a potential problem that is unrelated to the speech right that is infringed. As both the district court and the court of appeals concluded below, such a scheme is unconstitutional.

[6] This Court's cases upholding limits on aggregate contributions or contributions to political associations did so on the grounds that those limits were necessary to prevent individuals from circumventing the limits on giving to any one candidate. *See Buckley*, 424 U.S. at 38 ($25,000 aggregate limit on contributions); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. at 193-99 ($5,000 limit on contributions to PACs).

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR AMICUS CALIFORNIA REPUBLICAN PARTY IN SUPPORT OF THE RESPONDENT

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INTERESTS OF AMICUS CURIAE[1]

The California Republican Party ("Party" or "Amicus") is the ballot-qualified party of Republican voters in California. The Party was a petitioner in *California Democratic Party, et al. v. Jones, et al.*, 530 U.S. 567 (2000), supports candidates for federal office through a federal campaign committee in the same manner as the Respondent herein, and has particular experience with the challenged Party Expenditure Limit. The Party also was a plaintiff in a challenge to California's Proposition 208 state campaign finance initiative statute in *California Pro-Life Council PAC, et al. v. Scully, et al.*, 989 F. Supp. 1282 (E.D. Cal. 1998), *prelim. inj. aff'd*, 164 F.3d 1189 (9th Cir. 1999), in which the federal district court also took evidence on, and made factual findings concerning the relationship between political parties, their candidate nominees and contributors. These findings may be useful to this Court in evaluating the anti-corruption rationale asserted by the Petitioner Federal Election Commission in respect to the Party Expenditure Limit.

The Party also is concerned that it has been, and would continue to be, unable to communicate via a single mailing with all registered Republican voters either statewide to support its U.S. Senate nominees or in any of its 52 Congressional districts to support the Party's Congressional nominees in a regular general election or special

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[1] All parties have consented to the filing of this Amicus Curiae Brief, as indicated by letters of consent filed with the Clerk. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than amicus curiae, has paid for the preparation or submission of this brief.

election, without violating the Party Expenditure Limit. This restriction is particularly harmful to challenger candidates.

The Party believes the Party Expenditure Limit is an unconstitutional expenditure limit unjustified by the asserted governmental interest of "preventing corruption or the appearance of corruption."

SUMMARY OF ARGUMENT

The Party Expenditure Limit deters political parties from performing core First Amendment speech and associational functions in communicating not only with voters but also with the political parties' members concerning candidates. As such the Party Expenditure Limit operates as an unconstitutional expenditure limit without record evidence, or evidence in the analogous District Court Findings of Fact cited by Amicus, to support the restriction. Political parties' nature and activities, as described more particularly herein, demonstrate that arguments the Party Expenditure Limit is necessary to enforce Federal Election Campaign Act candidate contribution limits are speculative and contrary to record evidence.

ARGUMENT

I. State Political Parties in Modern Politics

Political parties are formed chiefly to elect candidates, who are the parties' standard-bearers in the election, to political offices. Amicus California Republican

Party, like other political parties such as the Respondent, works to elect its candidates, and also pursues litigation, speaks out on issues, services its members by hosting conventions, meetings and similar gatherings, makes independent expenditures, and participates in ballot measure campaigns.

Political parties' role in contemporary American politics has been disputed by academics and justices. However, this Court's decisions in both election cases and campaign reform cases have recognized that, respecting the protection of central, contemporary First Amendment speech and associational interests – particularly in the context of support and endorsement of candidates – political parties have a significant, if not special, constitutional status. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 224 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981); *California Democratic Party, et al. v. Jones, et al.*, 530 U.S. 567, 120 S. Ct. 2402 (2000).

This role is not without its challenges. Many commentators have observed that party power and influence have been in decline, with potential deleterious effects such as reducing voter turnout, increasing appearances of self-financed candidates, and personality oriented politics. *See* A. James Reichley, *The Life of the Parties* 341 (Rowman & Littlefield 2000 ed.).

A. The Political Party's Organizational Structure, Functions, and Fundraising Requirements Are Diffuse and Inimical to Corrupting Influences on the Party's Candidates

The Republican Party in California is a representative organization, which operates through a state central committee (Calif. Elec. Code §§ 7300-7389) and fifty-eight county central committees (Calif. Elec. Code §§ 7400-7470). *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 224 (1989). The state central committee's members comprise approximately 185 nominees and elected Republican partisan officeholders of state constitutional and legislative offices and of federal Senatorial and Congressional offices, nominated by Republican voters at partisan primary elections and elected by voters at ensuing general elections, together with approximately 650 of their appointees, and with approximately 550 representatives of Republican county central committees and Republican volunteer clubs (Party Bylaws, Art. I, § 2.01).[2] The fifty-eight county central committee organizations have nearly 1,000 members composed of elected central committee members elected by voters in their counties at the partisan primary election, and *ex officio* members comprising nominee and elected officeholders who represent electoral districts within the jurisdictions of their counties. Calif. Elec. Code §§ 7400-7406.

The state central committee constitutes the California Republican Party. That central committee operates through ten elected officers (Party Bylaws, Art. II, § 2.03)

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[2] The text of the Party's Bylaws may be found on its website <http://www.cagop.org/resources/bylaws.htm>.

and representatives who comprise a twenty-member Board of Directors (Party Bylaws, Art. II, § 2.03), a one-hundred member Executive Committee (Party Bylaws, Art. II, § 2.04), and standing committees that perform vital organizational functions. For example, the California Republican Party's bylaws provide for a "Cal Plan Committee," whose members are appointed by the Party's Chairman, and which functions to "propose a political plan and budget and make recommendations to the Party's Board of Directors on funding the budget to implement this political plan" to support state candidates. Party Bylaws, Art. II, § 2.06.06, subdiv. (H). The Party's bylaws also provide for a "Congressional Target Committee," similarly appointed and authorized, to propose a political plan to elect Congressional candidates. Party Bylaws, Art. II, § 2.06.06, subdiv. (I).

Since 1909, the Party's nominees are selected by Republican voters by partisan primary election. *Socialist Party v. Uhl*, 155 Cal. 776, 780 (1909). The Primary Election Law of 1909 created a closed primary, and California partisan primaries remained closed until the adoption of the Proposition 198 "blanket primary" invalidated by this Court in the last term. *California Democratic Party v. Jones*, *supra*. As this Court held in *California Democratic Party v. Jones*, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." 120 S. Ct. at 2408.

The principal opportunity for the Party to elect its nominee candidates is at general elections. The Party Expenditure Limit operates at such elections, and limits

the amount of resources the California Republican Party can spend in cooperation with its United States Senate and Congressional nominees, and thereby impinges upon the Party's ability to perform its core function.[3]

The Party's two principal means of electing candidates include "grass roots" organizing, to register Republican voters, assist Republicans in voting through absentee ballot and get-out-the-vote activities, and to express Republican viewpoints on a variety of issues,[4] and direct candidate support, through posted mailings and broadcast media.

B. Party Fund-Raising Needs and Broad Contributor Base

These grass roots and candidate support activities cost money. The Party raised and spent approximately $18 million during the 1998 elections on such activity, of which approximately $10 million was for federal candidate support and for the federal "share" of expenses for administration and overhead, voter drive activities

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[3] In 2000, the California Republican Party's coordinated expenditure limit was $33,780 per House race and $1,636,438 per Senate race. Federal Election Commission Release, Mar. 1, 2000.

[4] To accomplish these tasks, Amicus attempts to communicate and motivate the approximately 5.5 million registered Republicans in California, and persuade the approximately 10 million registered voters who are not Republicans to support Republican candidates and re-register as Republicans. It also tries to reach the 27% of eligible citizens in California who have chosen not to register to vote, to have them register and vote Republican.

including voter registration and get-out-the-vote, fund-raising costs.[5] Approximately 20% of that $10 million was devoted to support of candidates subject to the Party Expenditure Limit.[6] However, all $10 million was raised in amounts not exceeding $5,000 per contributor to the Party's federal committee or of up to $20,000 per contributor to the national party committee permitted to be transferred to the Party's federal committee. 11 C.F.R. § 110.1(c).

The Party's ability to support federal candidates under the Party Expenditure Limit depends on thousands of contributors. The Party's fund-raising apparatus and methods of necessity are wide-ranging in order to reach such a large number of potential, individual donors. Receipts from national party committee transfers, which are gathered from nationwide sources, necessarily are even more widespread and attenuated, and are inconsistent with the Petitioner's picture of large donors who

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[5] The Party pays for its administration costs, and other mixed federal/non-federal expenditures, under a federal/non-federal funding ratio set by federal law. 11 C.F.R. 106.5. That requirement is not at issue here, but the Court should remain mindful that federal restrictions on contributions to parties reach more than the party's direct federal activity on behalf of federal candidates. The Party's federal campaign reports are available for review on the Federal Election Commission's website, <www.fec.gov>, and its California filings are available on the California Secretary of State's website, <cal-access.ss.ca.gov>

[6] The Party spent approximately $2 million in support of its U.S. Senate candidate in the 1998 general election, and $32,500 in support of a Congressional nominee in a special 22nd Congressional District election in early 1998.

somehow commandeer the Party for their own corrupt purposes of influencing its candidates or operating as a "conduit" to further their own illicit purposes.

II. *Scully* Proposition 208 Findings Show that Political Parties are not Corrupting

The experience of Amicus, as reflected in the District Court's findings made in the recent litigation over California's campaign finance law, is that no "anti-corruption" rationale exists for the Party Expenditure Limit. Amicus asks this Court to take notice of the findings of the U.S. District Court in *California Pro-Life PAC v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), *prelim. inj. aff'd*, 164 F.3d 1189 (9th Cir. 1999) (Findings of Fact posted by court at <www.caed.uscourts.gov>. In the *Scully* case, California political parties, political committees, and other political activists challenged numerous provisions of California's Proposition 208, which instituted numerous new campaign finance regulations into California law.[7]

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[7] Proposition 208 imposed contribution limits of $5,000 per contributor per year on contributions to political parties for any state campaign purpose (Calif. Gov. Code § 85303); prohibited "independent expenditures" by political party committees outright (Calif. Gov. Code § 85500); imposed aggregate limits on contributions by contributors to all state candidates and committees, including political parties of $25,000 per year (Calif. Gov. Code § 85310); and also imposed expenditure limits on political parties expenditures in support of candidates to 25% of the applicable spending limits imposed directly on candidates (Calif. Gov. Code § 85304).

In ruling on the contentions raised in *Scully*, Amicus and other Plaintiffs presented evidence in support of their allegations that these complex, interlocking contribution and expenditure limits effectively prevented the political parties and candidates from communicating effectively their campaign messages.

The political party plaintiffs presented evidence, and the District Court made Findings of Fact regarding party activity in California, that this Court may find enlightening and useful in the present matter. The District Court's Findings first addressed the role of the parties in supporting candidates for office. The District Court found that "[h]istorically, political parties have made significant expenditures in support of candidates and have coordinated those expenditures with their candidates." *Scully* Findings of Fact 414. The District Court continued:

> In the past, the majority of [California Democratic Party]'s and [California Republican Party]'s contribution to candidates have been in the form of coordinated "in-kind" contributions, such as mail pieces advocating the election of a candidate. In 1996, most candidates that received support from CDP, received more than 90% of that support in in-kind contributions. A high percentage of Party support for candidates was in the form of in-kind contributions.

Scully Findings of Fact 416.

"In the past, political parties have expressed support for candidates through communications with their members." *Scully* Findings of Fact 420. Such support can be expensive. The District Court found that a single mailer to Democrats or Republicans only in an Assembly district

costs approximately $40,000.[8] *Scully* Findings of Fact 418. "The costs of all aspects of campaigns have increased over time. Mail, phones, radio and television costs all continue to increase, and the political parties must use these means of communicating with their very large memberships." *Scully* Findings of Fact 419.

As these findings determined, the Party and other state party committees are dedicated to helping candidates, a task for which they are increasingly challenged by rising communication costs and (in the federal arena) the limits posed by the Party Expenditure Limit. The Party does not accept contributions earmarked for specific candidates. *Scully* Findings of Fact 410. If donors attempted to support candidates through the Party, such earmarked contributions would be legally attributable to the donor, thwarting any attempt to circumvent the limits. *See* 11 C.F.R. § 110.6(b), *see also* Calif. Gov. Code, §§ 84302 and 85704. Moreover, the Party chooses how and where to spend its funds. Contrary to Petitioner's implication, coordinated expenditures are not simply handed over to candidates in a manner "indistinguishable" from contributions.[9]

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[8] California's eighty State Assembly districts contain approximately 372,000 residents each, compared with the approximately 572,000 residents in each of the state's 52 Congressional districts.

[9] Indeed, U.S. Postal Service Regulations prohibit a state party from simply providing the money for a candidate to mail a campaign message using the Party's special bulk mailing permit, since the regulations governing a Party's bulk mailing do not allow unqualified third parties to participate in "cooperative mailings," i.e., to use the special bulk permit. *See*, *e.g.*, 39 U.S.C. § 3626; Domestic Mail Manual E670 (governing use of Standard (A) nonprofit permit).

Amicus' practice and experience, as demonstrated in record testimony and the District Court's findings in *Scully*, differ dramatically from the hypothetical posits about the potential for undue influence of not only putative donors with corrupt purposes, but also of the Party itself exercising corrupt purposes through its support of candidates. (Pet. Br. 25-34.)

The Party raises money to fund the "party-building" and candidate support activities in support of its federal and state candidates, and the Party's decision-makers (its officers, directors, Executive Committee, Cal Plan and Congressional Target Committees) make such decisions. As former Party Chairman Michael Schroeder succinctly stated in his trial testimony in the *Scully* case: "[T]he only criteria that we use, and the only criteria that are reflected in our political plans, are who can win." Schroeder trial testimony, *California Pro-Life Council PAC v. Scully* at 120 (hereinafter Schroeder trial testimony).

To the best knowledge of Amicus and according to the sworn trial testimony of its former Chairman, Party donors do not solicit or receive favors from elected officials in return for Party contributions. Nor do donors receive favors from the Party that can be understood in any way as "corrupt" because the Party, as a private organization, lacks the capacity to deliver a vote, change a ruling or otherwise provide a corrupt reward.

The Party's former Chairman also testified in *Scully* that he had never been asked by a donor to approach a

legislator with a legislative request, and had never heard of such a thing happening. Schroeder trial testimony at 116, 125. Nor do donors use party fund raisers as a means to lobby legislators. Schroeder trial testimony at 117, 126. Chairman Schroeder also noted in his deposition during discovery for the *Scully* case that the Party does not attempt to monitor or influence legislators concerning the positions they should hold on issues, or allocate funds to officials based upon the positions they hold, except to the extent that a candidate's opinions on issues affect his or her electability. Schroeder 1997 Deposition, at 91-94, 98-99, 104-05.

Accordingly, the Party Expenditure Limit, which limits a party's expenditures on behalf of its candidates, poses a real and onerous burden on a political party's core activity and its ability to communicate effectively not only with voters in general but also with the Party's own members. Moreover, in the experience of the Party, and as shown in District Court's Findings of Fact as well as sworn testimony in the *Scully* case, such a limit serves no cognizable "anti-corruption" purpose. The speculations of political commentators and academics, whatever they may be, should not outweigh the direct evidence offered on these points.[10]

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[10] Other courts presented with newspaper articles and similar documents containing vague sentiment about campaign corruption have found that evidence insufficient to justify limits. *See FEC v. NCPAC*, 470 U.S. 480, 499-500 (1985); *Colorado Republican Fed. Campaign Committee*, 41 F. Supp. 2d at 1200.

III. *Scully* Findings of Fact Substantiate That the Converse of Petitioner's Soft Money Fears is True, and that the Party Expenditure Limit Likely Promotes The Use of Soft Money to Evade Federal Candidate Contribution Limits

Petitioners argue that a party's ability to raise funds outside the federal limits (so-called "soft money") provides an arena where large soft-money donors can influence the party to make coordinated expenditures to the donor's favored federal candidates. According to the Petitioner, the Party Expenditure Limit serves in this attenuated fashion to prevent "soft money" circumvention of the federal individual contribution limits. Pet. Br. at 32. The Party agrees with the Respondent that *the converse* is more likely correct: that expenditure limits such as the Party Expenditure Limit actually promote efforts to circumvent the Federal Election Campaign Act's contribution limits to candidates by means of "soft money." *See, e.g., Nixon v. Shrink Missouri Government PAC*, 528 U.S. 337, 120 S. Ct. 897, 914 (2000) (Kennedy, J., dissenting.)

The Petitioner's national committee "soft-money" argument is just speculation – speculation seemingly without a shred of record evidence to support it – and should not cloud the issues raised in the instant case. This case entirely concerns whether the Party Expenditure Limit, funded by lawful contributions to a state party's federal committee, is unconstitutional. However, the Party would like to direct the Court's attention to several of the District Court's Findings of Fact in *Scully* that call into question Petitioner's "soft money" speculation.

The District Court in *Scully* found that California's state political committees engage in numerous non-federal campaign activities, including raising money and spending money to support or oppose state and local candidates and statewide ballot measures, and to engage in issue advocacy. A substantial percentage of the California political parties' annual non-federal campaign budgets, particularly in non-election years, is expended on administrative overhead, including office space, salaries, taxes, insurance, utilities, and party-building activities, such as voter registration and party conventions. (*Scully* Findings of Fact 399.) Were these expenses to be met using only funds raised under the federal hard dollar limits, it is likely, based upon the year-long experience of the Party in California under Proposition 208, "the Party would cease doing business in any meaningful way." (*Scully* Findings of Fact 408.)

Mindful of the District Court's decision in *Scully*, California's voters adopted campaign reforms by a new initiative statute, Proposition 34, at the November 2000 general election. Proposition 34's provisions promote the political parties' role in the state's political process, and these provisions encourage contributions to political parties in order to insulate candidates from special interest influences.[11]

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[11] Proposition 34's legislative findings state, *inter alia*, that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions." The measure's purposes include "(7) To strengthen the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting

Proposition 34 limits contributions by "persons," including individuals, political action committees, corporations, and labor unions to candidates from $3,000 to $20,000 per election, based on the level of the political jurisdiction (Calif. Gov. Code §§ 85301-85302), and limit contributions to political parties to $25,000 per year to be used for contributions directly to non-federal candidates. Calif. Gov. Code § 85303(c). Political parties may make unlimited contributions to, and expenditures on behalf of non-federal candidates using such limited funds. *Compare* Calif. Gov. Code §§ 85303 *with* 85400(c).

Accordingly, Petitioner's general assertions that somehow a party's ability to raise soft money necessitates an expenditure limit such as the Party Expenditure Limit on fully regulated and reported hard dollar expenditures has no basis in the experience of Amicus. Petitioner's argument is unpersuasive, and should be rejected by this Court.

CONCLUSION

The Party Expenditure Limit unconstitutionally restricts political parties' associational and speech interests, particularly interfering with their communications

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restrictions on contributions to, and expenditures on behalf of, party candidates, to a full, complete and timely disclosure to the public." The ballot pamphlet containing the text of Proposition 34 is posted on the California Secretary of State's website at <vote2000.ss.ca.gov/VoterGuide/text/text___proposed___law___34.htm>

with voters and their party members concerning candidates. The Party Expenditure Limit, or any other limit on party expenditures made on behalf of candidates, does not serve a governmental interest in preventing corruption or the appearance thereof for the reasons set forth above. Parties exist to work with candidates. This observation is not evidence of corruption but is instead "consistent with our model of representative democracy." *FEC v. Colorado Republican Federal Campaign Committee*, 231 F.3d 1221, 1232 (10th Cir. 2000) (*Colorado II*); *see also Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 630 (1996) (Kennedy, J., concurring).

Nevertheless, under current federal law the California Republican Party may not make expenditures of its own hard-dollar funds in coordination with one of its nominees to the House of Representatives exceeding $33,780, or in coordination with one of its nominees to the Senate exceeding $1,636,438. In a state with roughly 21.5 million citizens eligible to vote, these limits serve to diminish the Party's efficacy without constitutional justification.

Respectfully submitted,

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Respondent.

On Writ of Certiorari to the
United State Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE

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INTEREST OF AMICUS CURIAE

Amicus Curiae National Republican Congressional Committee ("NRCC") is a national political party committee, established in 1866 and currently organized under Section 527 of the Internal Revenue Code, devoted to increasing Republican membership in the U.S. House of Representatives. The NRCC supports the election of Republicans to the House through direct financial contributions to candidates and Republican Party organizations; coordinated party expenditures;[1] technical and research assistance to Republican

[1] The NRCC, like all political committees, conducts its coordinated expenditures using hard dollars. Although several amici curiae supporting the petitioner have submitted papers before this Court discussing the

candidates and Party organizations; voter registration, education and turnout programs; and other Party-building activities. The NRCC's primary sources of funding are transfers of excess campaign funds and other contributions from Members of Congress, and individuals from all walks of life making small donations of $100 or less.

The NRCC is governed by a chairman and an executive committee composed of thirty Republican members of the U.S. House of Representatives. The Chairman is elected by the House Republican Conference after each congressional election. The day-to-day operations of the NRCC are directed by a deputy chairman and conducted by a professional staff of over 50 people with expertise in campaign strategy development, planning and management, research, communications, fund raising, administration, and legal compliance.

Unlike the petitioner and its amici curiae, as a national political party committee, the NRCC is authorized to make coordinated party expenditures by the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, and has made such contributions in the past. *See Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41 (1981). The NRCC has followed FECA's limitations when making coordinated expenditures since FECA's enactment. The NRCC's experience with making expenditures that are coordinated with congressional candidates in light of the FECA provision at issue places it in a unique position to comment on the practical effects of that provision. With the benefit of years of experience of laboring under the old regime prior to the Tenth Circuit's decision in this case, the NRCC

dangers of soft money, concerns over soft money are simply not implicated by any of the issues before the Court in this case.

can explain precisely how the expenditure limitation at issue restricts the NRCC's right to free speech. In addition, the experience of the NRCC poignantly demonstrates that the claim of the Petitioner and its amici – that a decision by this Court to uphold the decision below would result in a regime in which there was corruption or the appearance of corruption in the political process - is simply inaccurate.

SUMMARY OF ARGUMENT

In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), this Court struck down as violative of the First Amendment FECA's provision limiting the amount of independent expenditures that could be made by political party committees in political campaigns. Because the particular expenditure before the Court was an independent expenditure, the Court did not reach the broader issue of the constitutionality of FECA limitations on coordinated expenditures in that case. *See id.* at 623. The Court did observe that "coordinated expenditures do share some of the constitutionally relevant features of independent expenditures," although "[the] issue is complex." *Id.* at 624. Today, as the Court seeks to resolve the issue of whether coordinated expenditures may be limited consistent with the strictures of the Constitution, it must necessarily decide whether, for constitutional purposes, a coordinated expenditure more closely resembles a direct contribution to a candidate's campaign or an independent expenditure made on his behalf.

Coordinated expenditures are very similar to independent expenditures in every constitutionally important sense. Unlike direct contributions, title to the money being spent remains with the party committee, not with the campaign. The party committee, not the campaign, assumes any legal liability that may result from the expenditure. The

party committee, not the campaign, decides how and for what purpose the money will be spent. The FEC has recognized each of these points and, for twenty-five years, has expressly drawn a distinction between coordinated expenditures and direct contributions. Only now, in a *post hoc* attempt to justify the constitutionality of the provision before the Court today, the FEC attempts to equate the acts of a contribution and a coordinated expenditure. There is no reason to follow the FEC down this path.

But whether treated as a contribution or an expenditure, the provision at issue cannot survive constitutional scrutiny because it serves no important government interest. The primary purpose of the FECA is to prevent corruption and the appearance of corruption. The Petitioner justifies the coordinated expenditure limitation as serving this goal by preventing large donors from circumventing FECA's direct contribution limitations and "funneling" money to campaigns through political party committees by contributing to those party committees and then compelling those party committees to expend those funds as an coordinated expenditure on behalf of the candidate to whom they wish to contribute. However, the FECA's limitation on coordinated expenditures is absolutely useless at preventing this imaginary concern, for numerous reasons. First, FECA's limitation on contributions from private donors to political party committees, which will remain in effect regardless of the outcome of this case, prevents any donor from donating large enough sums of money to any party committee as to create the appearance of the danger that either the party committee, or the political candidate with whom the committee conducts an expenditure, will fall under the donor's influence. Second, the structure and organization of party committees is sufficiently large and bureaucratic in nature to prevent any donor or group of donors

from exerting undue influence over the committee. Third, the NRCC's experience in the 2000 election cycle shows that donations from outside individuals are largely unnecessary as a source of funding for coordinated expenditures, because the excess campaign funds of Members of Congress transferred to the NRCC alone could have funded all of the NRCC's coordinated expenditures for the entire election cycle many times over. And fourth, the NRCC's experience in the 2000 election cycle also shows that coordinated expenditures are rarely and sparingly used in races involving incumbent Members of the House and almost never made for the benefit of senior Members – the kind from whom a large donor would want to seek influence. Instead, such expenditures are almost uniformly made in a limited number of races each election cycle – usually those involving open seats, a kind of race in which there can be little appearance that the money is being used to curry favor from a powerful elected officials.

For these and other numerous reasons, FECA's limitations on coordinated expenditures serves little purpose other than to restrict the ability of party committees to get their message out before the general public with the approval of a campaign. While many view any rule which keeps money out of politics as a good rule, this Court has never embraced such a draconian approach. Absent any showing of a compelling need to keep coordinated expenditures limited in order to prevent the appearance of corruption – and none has been provided by the petitioner – this Court must affirm the right of the party committees to engage in their political speech in the manner, and to the extent, that they see fit.

ARGUMENT

I. Coordinated Expenditures Are, And Have Traditionally Been Deemed By the Petitioner, To Be

More Akin to Constitutionally Protected Expenditures Than To Contributions That May Be Limited Consistent with the First Amendment.

Petitioner and its amici have consistently failed to recognize the fundamental differences in fact and in law between a coordinated expenditure and a direct contribution. The petitioner would have this Court equate the two, arguing that jurisprudence upholding the constitutionality of limits on direct contributions compels this Court to uphold the expenditures limits at 2 U.S.C. § 441a(d)(3) of FECA. But this conflation fails to take into account the very real and important distinctions between the two types of activities.

The petitioner would gloss over the fact that this Court has expressly drawn a legal distinction between contributions and expenditures for purposes of constitutional analysis. Only last year, this Court established that restrictions on expenditures require a higher level of constitutional scrutiny than those on contributions. *See Nixon v. Shrink Mo. Gov't PAC*, 120 S.Ct. 897, 901-902 (2000). As this Court explained, limitations on expenditures closely implicate the right to Free Speech, whereas limits on contributions implicate "more heavily on the associational right than on freedom to speak." *Id.* at 904. The Tenth Circuit below properly recognized that the constitutional distinction between expenditures and contributions was a longstanding one when it observed that this Court had, in the case of *Buckley v. Valeo*, 424 U.S. 1 (1976), "recognized [a] distinction between (permissible) restrictions on contributions and (impermissible) restrictions on expenditures[,] impl[ying] that different types of FECA limits require different levels of justification." *FEC v. Colorado Republican Campaign Committee*, 213 F.3d 1221, 1226 (10th Cir. 2000).

In deciding whether the Court below correctly held that FECA's limitation on coordinated expenditures was unconstitutional, this Court should contrast the nature of conducting a coordinated expenditure with the making a direct contribution. Because the act of contributing may not be equated with the act of conducting a coordinated expenditure, this Court should apply the same level of scrutiny to limitations on coordinated expenditures that it has applied to other expenditure provisions. *See Colorado v. Republican Federal Campaign Committee*, 518 U.S. 616, 620 (1996) ("*Colorado I*") (striking down FECA's restrictions on independent expenditures).

Important differences between the two activities caution against this Court accepting the FEC's self-serving claim that coordinated expenditures are the same for constitutional purposes as cash contributions. Coordinated expenditures are simply not the legal, factual, or functional equivalent of contributions. As a starting point, the fact that the coordinated activity of a campaign and a party committee has been labeled by the FECA and the FEC as a coordinated "expenditure," rather than coordinated "contribution," is revealing. The selection of this nomenclature is no mere accident; in every meaningful sense, a coordinated expenditure is more similar to an independent expenditure than a contribution.[2] The proof of this point is contained both in the fundamental nature of the two activities as well as in the FEC's own regulations and materials.

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[2] Indeed, coordinated expenditures need not even be "coordinated" in the perjorative sense. "Although consultation or coordination with the candidate is permissible, it is not required." 15 Op. Fed. Elect. Comm. 3 (1984).

Like private citizens, political party committees have the right to make direct contributions to the campaigns of political candidates. When a party committee does so, with the exception of certain "in-kind" contributions, the organization makes out a check to that particular candidate for the amount of money the party committee wishes to contribute. Then the check is delivered and presumably cashed by the campaign. At that point, *title and ownership to the money has transferred* from the party committee to the candidate. The money now belongs in every real sense to the campaign, not the party committee. This simple fact carries with it an important implication – the campaign can spend the money however the campaign sees fit. The party committee makes no attempt to track the way in which the campaign spends the contribution, nor does it mandate that the money be used for certain purposes or otherwise attempt to place strings upon the contribution. Consequently, the campaign can spend the money on advertisements, staff salaries, direct mailings or anything else the campaign chooses. Given the wide latitude the FEC has generally accorded to campaigns over the way in which they spend their own money,[3] the campaign could, if it so chose, elect to spend the party committee's contribution in a way that the party committee might view as wasteful, such as by spending it on frivolous items like balloons or embroidered napkins. Simply put, the party committee's involvement with the money ceases from the moment the check is delivered.

In the situation of a coordinated expenditure, on the other hand, title, ownership, and even possession of the money is never transferred to the campaign. *The party committee expends its own money directly to vendors*. The money never

[3] *See, e.g.*, 1 Op. Fed. Elect. Comm. 2 (1977) ("The Act does not limit the discretion of campaign committees to make their own determination as to the types of expenditures which should be made.").

at any point enters the campaign's accounts. This distinction between coordinated expenditures and cash contributions has long been recognized by the FEC. In 1975, in an Advisory Opinion regarding contributions, the FEC stated:

> In reaching this conclusion [that a political committee's check constituted a contribution] the Commission is mindful that . . . a state party and its lawfully designated subcommittee may expend up to $10,000 on the general election campaign of a Congressional candidate. *However, a direct donation of money to a candidate – as in the present instance – is not the same as an expenditure "in connection with the general election campaign" of a candidate.* In one case, the candidate acquires exclusive use of the monies in question; in the other, the state party, although it may consult with the candidate as to how to expend the funds, has control over how the monies are used.

120 Op. Fed. Elect. Comm. 3 (1975) (empahsis added). From that time until the present case, the FEC has never reconsidered its decision that a party committee's retention of control over coordinated expenditures means that such expenditures are not legally the same as contributions. Now, abandoning twenty-five years of its own agency jurisprudence, the FEC seeks to conflate expenditures and contributions for purposes of defending FECA's last remaining involuntary limitation on expenditures contained in the statute.[4]

[4] Limitations on expenditures for candidates who accept public financing of their campaigns have not been struck down by courts in the same manner as every other limitation on expenditures has been struck down

But the longstanding and crucial distinction between coordinated expenditures and campaign contributions has not only been drawn expressly by the FEC in advisory opinions, but is implicitly made throughout the entire structure of federal campaign law. The FECA itself addresses limitations on party contributions and limitations on party coordinated expenditures in separate provisions. Limitations on the total dollar amount of contributions that may be made by a party to a candidate are contained in 2 U.S.C. § 441a(a)(2)(A), which prohibits a political committee from making contributions to any particular candidate's campaign "with respect to any election for Federal office which, in the aggregate, exceed $5,000." Coordinated expenditures are addressed by a separate provision appearing several subsections later, at 2 U.S.C. § 441a(d)(3), which limits such expenditures to $10,000, $20,000, or two cents multiplied by the voting age population of the State, depending on the particular office being sought by the candidate. This view of coordinated expenditures and direct contributions as distinct activities is carried through in the text of the penalty provision of the statute which describes the acts of "accepting any contribution" and "making any expenditure" as separate violations of the act. *See* 2 U.S.C. § 441a(f). If Congress had desired to treat contributions by political parties the same as coordinated expenditures, it could easily have done so. The existence of the separate provisions addressing these issues demonstrates that the two activities were considered distinct from each other by Congress. The choice of Congress to keep these two activities separate deserves deference, since the "choice of means" for regulating elections "presents a question primarily addressed to the

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outside the area of public financing. By accepting government financing of their speech, candidates who accept public monies voluntarily choose to have their right to engage in free speech limited. *See Buckley*, 424 U.S. (passim).

judgment of Congress." *Bourroughs v. United States*, 290 U.S. 534, 547 (1934).

Petitioner's attempt to equate coordinated spending with direct contributions is also at odds with petitioner's own regulations and publications. The FEC's regulations have imposed very strict reporting requirements on campaigns for all contributions. For example, 2 U.S.C. § 434(b)(2)(C) requires candidate committees to report contributions from party committees, and 2 U.S.C. § 434(b)(3)(B) requires that report to include the amount, date of receipt, and the contributing committee's name and address. When the money received is spent by the campaign, this too must be reported. *See* 2 U.S.C. § 434(b)(4)(A). Political committees must also report making the contribution to the campaign. *See* 2 U.S.C. § 434(b)(2)(D). *Coordinated expenditures, on the other hand, are not reported by the campaign at all* – neither as an expenditure nor as a receipt. The coordinated expenditure is reported only by the political party committee, and in fact is reported as an expenditure, not a contribution to the campaign. *See* 2 U.S.C. § 434(b)(4)(H). If the FEC truly believed in the position that it has taken before this Court – that coordinated expenditures should be viewed and treated as contributions – it would long ago have required the campaigns to report coordinated expenditures as a contributions. Instead, the FEC's regulations reflect what the FEC has always, prior to this appeal, told the public: "Coordinated party expenditures differ from contributions in [many] ways." Federal Election Commission, Campaign Guide for Political Committees, August 1996, at 16.

These and other incongruities belie the FEC's post hoc attempt to justify as constitutionally permissible its limitation on expenditures. In fact, these expenditure limitations are

analytically similar to the limitations on expenditures that were struck down by this Court in *Buckley*. Like limitations on independent expenditures, limitations on coordinated expenditures "preclude[] most associations from effectively amplifying the voice of their adherents." *Buckley*, 414 U.S. at 20-21; *see also Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) ("[A]llowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system"). While restrictions on the voice of the people may be justified where necessary to avoid the appearance of corruption, *see Shrink Missouri*, 120 S.Ct. at 905, in this case, contrary to the petitioner's suggestion, there is no genuine concern that the striking down of expenditure limits will result in any impropriety or appearance of impropriety. An understanding of the NRCC's coordinated expenditures during the 2000 election cycle will serve to highlight this point.

II. The NRCC'S Experience In The 2000 Election Cycle Contradicts Petitioner's Claims That Allowing Unlimited Coordinated Expenditures Will Result In The Circumvention Of Other Provisions Of The Election Code Or Create The Appearance Of Impropriety.

Petitioner's sole justification for equating contributions and coordinated expenditures for purposes of constitutional analysis is petitioner's assertion that absent a limitation on coordinated expenditures, large donors will use political committees to "launder" large contributions to the candidates. Petitioner and its amici curiae (none of whom have ever actually made coordinated expenditures) seek to create a fear

that FECA's direct limits on contributions to political campaigns will be circumvented by large donors, who will contribute money to political committees with the understanding that these committees will pass the money directly on to the campaign in the form of coordinated expenditures that are in fact controlled by the campaign.[5] This concern is simply contrary to the reality of the way coordinated expenditures are actually conducted.

These concerns are misplaced for numerous reasons. First, FECA's limits on contributions to political party committees render its coordination expenditure limits superfluous as a means to prevent campaigns and political committees from falling under the influence of large donors. Section 441a(a) of FECA limits the size of annual contributions that can be given by an individual donor to $20,000 for national party committees and $5,000 to other political action committees, $1,000 per election to individual campaign committees, with an overall umbrella limitation of $25,000 (a limit that has not changed since 1975). *See* 2 U.S.C. §441a(a)(1)(B) & (C). Regardless of what limitation there is on coordinated expenditures (and we think there should be none), it will not disturb these congressionally-mandated limits on the contributions the NRCC can receive to fund its these expenditures. As this Court correctly observed in *Colorado I*, the existence of these contribution limitations means that the opportunity for corruption "is, at best attenuated." *Colorado I*, 518 U.S. at 616. Absent any limit on coordinated expenditures, the contribution limitations will prevent donors from donating a large enough sum to any one political committee as to create the appearance that the donor

[5] A political committee could not simply donate the money to the campaign directly because of the $5000 limit on party committee contributions contained in 2 U.S.C. § 441a(a)(2)(A).

might acquire an undue influence over the committee's activities.

Second, as a simple practical matter, political committees have become too large and bureaucratic to readily lend themselves to "capture" by private parties.[6] The NRCC has over thirty Members serving on its board. It maintains a sizable and growing full-time staff. The staff of the NRCC, like most party committees, is divided into different divisions. The finance division oversees matters relating to the receipt of contributions. The political division makes decisions relating to election campaigns such as whether and how much money to spend on coordinated expenditures. In simple terms, this means that the party committee personnel who receive money are not the same personnel who make decisions regarding how that money is to be spent. While petitioner and its amici curiae would have this Court uphold the expenditure limitation out of fears that cabals will form between employees in these divisions that might allow some sort of linkage between contributions and expenditures, the reality is that the number of employees involved in these decisions and the segregation of these responsibilities makes the existence of this kind of conspiracy, or the appearance of such a conspiracy, highly farfetched.

Third, political committees exert a degree of control over coordinated expenditures that is inconsistent with the petitioner's claim that corruption will erupt if the expenditure limits are removed. When the NRCC engages in coordinated

[6] As we have discussed, where the party committee elects to contribute $5000 directly to a campaign, that money becomes the property of the campaign and is spent in any way the campaign sees fit, without any say from the party committee. Just as a party committee loses control over the money when it contributes it to a campaign, so too does a donor lose control over money once it has been donated to a party committee.

expenditures, it does not take actions that are tantamount to handing the campaign a blank check, as petitioner implies. Rather, control over coordinated expenditures remains in the hands of the NRCC. Particular coordinated expenditures are ultimately selected by the NRCC, not the campaign. If the NRCC decides to pay for advertising for the benefit of a particular candidate, for example, then it is the NRCC, not the campaign, that has final approval and review of that advertisement for content. The NRCC, not the campaign, assumes legal liability for the content of the advertisement. The political committee's retention of control over coordinated expenditures is reflected in FECA itself. When a Committee runs an advertisement as part of a coordinated expenditure, the statute requires the publication of a disclaimer which states: "Paid for by the NRCC and authorized by candidate Smith." *See* 2 U.S.C. § 441d(2). This required disclaimer exemplifies the relative balance of power between the political candidates and party committees when it comes to the coordinated expenditure of the party committee's money. Of course, the candidate retains some say regarding the content of the advertisement; the party committee would not run an advertisement directly contrary to the message of the candidate's campaign, for example. But in every meaningful sense, the advertisement contains a message from the NRCC, not the campaign.

As a result, the NRCC views advertisements resulting from coordinated expenditures as its own speech. The process by which the NRCC engages in that speech is virtually identical to the process by which it engages in protected free speech by making an independent expenditure, with the sole exception that the coordinated expenditure is done with the authorization of a particular candidate's campaign. The fact that a coordinated expenditure reflects a party committee's

own speech renders the expenditure analytically similar to an independent expenditure, and not at all similar to a direct contribution, whose only communicative aspects comes from the act of giving. Despite their similarity, however, the existence of independent expenditures as an alternative to coordinated expenditures as a method for engaging in speech unfortunately does not serve to limit the degree of infringement on the NRCC's speech posed by the coordinated expenditure limit. The FEC's stringent rules regarding the characteristics necessary for an expenditure to qualify as independent are so murky, and precedent on the subject so unclear, that political committees have been unable to ascertain exactly how "independent" an expenditure needs to be to qualify as an independent rather than a coordinated expenditure. As a result, fear of investigation by the FEC and possible liability has chilled this form of speech so much that it is rarely if ever used by political committees. In fact, the NRCC did not make a single independent expenditure in conjunction with the November 2000 general election.[7] If the decision of the court below is reversed, the real possibility exists that the NRCC's political speech will be silenced almost in its entirety.

A study of the sources of the funds used for coordinated expenditures and the races in which coordinated expenditures are made further dispels any notion that coordinated expenditures could be utilized by large donors to circumvent direct contribution limits or improperly "buy influence" with powerful Congressmen. As a starting point, the NRCC's reports show that it spent just over 3.5 million

[7] In fact, the NRCC has only made one independent expenditure, and that was done under unique circumstances presented by a special election held last year. Without any basis, the FEC questioned the independence of that expenditure, requesting additional information on the matter.

dollars on coordinated expenditures during the 2000 election cycle. During the same cycle, Members of Congress transferred over 11 million dollars of their own excess campaign funds to the NRCC. *See* 2 U.S.C. § 439a (allowing Members of Congress to transfer excess campaign funds to party committees. Consequently, the NRCC could have funded all of its coordinated expenditures many times over simply by using the money left over from various Congressional campaigns; *private contributions from any source were not essential* to the making of any of the NRCC's coordinated party expenditures. The large donors imagined by the petitioner and its amici simply have not attempted to circumvent the contribution limitations or otherwise exert on undue influence over the political process in the manner they suggested.

Nor would large donors have been successful even if they had attempted to make large contributions in the 2000 election cycle with the purpose that the contributions be spent on coordinated expenditures that would "purchase" influence in the House of Representatives. Following the petitioner's logic, in order to "buy influence" in Congress, a major contributor would want for his or her contribution to be used to pay for a coordinated expenditure for the campaign of a powerful Congressman, such as the head of a major House Committee. Yet no such senior members of the House or other similarly situated Congressman benefited from any coordinated expenditures from the NRCC during the 2000 election cycle.

Furthermore, if major donors seeking to evade FECA's direct contribution limitation to political campaigns were to exist (notwithstanding the presence of FECA's limitations on contributions to political party committees), those donors

would want, at a minimum, for his or her expenditure to benefit a sitting incumbent. A candidate who has yet to win office would be a bad investment – very likely to lose (and therefore have nothing to offer the donor but a hearty handshake), or if the new challenger were fortunate enough to prevail, as a freshman Congressman he or she would have very little influence that could benefit the wealthy donor. Again, the facts show that just the opposite occurred in the 2000 election cycle. The vast majority of NRCC's coordinated expenditures were done not for the benefit incumbents, but in open seats or in seats where the NRCC deemed the democratic incumbent to be politically vulnerable. In fact, of the 435 House elections in the 2000 election cycle (59 of which were uncontested), the NRCC made coordinated expenditures in only 57, and of those only 22 were races involving Republican incumbents. In the elections in which a Republican incumbent benefited from a coordinated expenditure by the NRCC, that incumbent was in serious danger of losing the election. If individual donors had been depending on the NRCC to make coordinated expenditures on their behalf in order to curry favor with powerful politicians, then they would have been sorely disappointed.

That large coordinated expenditures are rarely if ever made to benefit incumbent politicians should come as no surprise to any student of politics. The NRCC, as a body, exists to increase the Republican membership of Congress. As a means of furthering this end, coordinated expenditures made on behalf of incumbent Representatives are largely useless. Incumbent Representatives are usually re-elected without the need for assistance in the form of coordinated expenditures, and any hard money that is available for such expenditures is better spent seeking to increase the number of Republican seats by targeting open seats or seats with politically vulnerable

Democrats. In the rare case in which an incumbent benefits from a coordinated expenditure, it is because his or her seat has become politically vulnerable to a Democratic challenger (heavily supported by his or her party) due to changes in the makeup of his or her constituency, the perception of poor job performance, or other such factors. By the time the candidate benefits from the expenditure, it is already extremely likely that the seat will be lost.

For these reasons, if the NRCC were permitted to expend an unlimited amount of money on coordinated expenditures, the NRCC still would not suddenly begin to spend money in races involving powerful incumbent Congressmen. Instead, if given the opportunity, the NRCC would spend additional money in the races that in which it would already make coordinated expenditures – races involving open seats or politically vulnerable Democratic incumbents.[8] Additional spending in these types of races simply does not create any sort of appearance of corruption. If anything, it creates the opposite impression – that the NRCC is using its right to free speech to introduce the public to the relatively unknown challengers that the Republican Party supports, and perhaps possibly that the NRCC is seeking urge the American people to remove those of its opponent's politicians who have been corrupted by their tenure in Washington.

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[8] Despite having the Tenth Circuit's decision as controlling legal authority on its side, the NRCC did not exceed the coordinated expenditure limit in the 2000 election cycle, because the petitioner threatened to retroactively pursue any party committee that exceeded the limit, even in the Tenth Circuit, in the event this Court reversed the court below after the election was over. *See* Mike Allen, *GOP May Defy Curb on House Campaigns; Spending Would Test Court Ruling*, **Washington Post**, July 10, 2000, at A1.

Consequently, neither logic nor facts bear out the petitioner's suggestion that, absent reversal of the court below, large donors will take advantage of the existence of the ability of political parties to make unlimited coordinated expenditures in order to make an end run around FECA's contribution limitation and thus exert a "corrupting influence" over Congress. So understood, the petitioner can simply afford this Court no reason to ignore the NRCC's important First Amendment right to expend its money as it sees fit, and in any amount it sees fit. Petitioner has simply failed to provide any important government interest that would support such a restriction in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL VOTING RIGHTS INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus National Voting Rights Institute is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to an equal and meaningful vote and to equal and meaningful participation in every phase of electoral politics.[1] Through litigation and public education, the Institute works to ensure that those who do not have access to wealth are able to participate fully in the political process.

Wealth is far too important in modern elections—so much so that without meaningful regulation of campaign finance, including expenditures coordinated by parties and their candidates, the ability of those without wealth to participate meaningfully in the political process is threatened. Because of the compelling interests in the integrity of the political process that are at stake, the Institute respectfully urges reversal of the Tenth Circuit's ruling invalidating the limits on party-candidate coordinated expenditures found in the Federal Election Campaign Act ("FECA") at 2 U.S.C. § 441a(d)(3).

SUMMARY OF ARGUMENT

This Court has rightly upheld the constitutionality of limits on direct contributions to candidates. Those limits are necessary to contain the corrosive effect of wealth on the political process. As Congress and the FEC have well understood, party-candidate coordinated expenditures are functionally indistinguishable from direct contributions, and must be regulated. Without such regulation, the limits on direct contributions are easily circumvented.

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[1] Pursuant to Rule 37.3(a) the parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no other person or entity made a financial contribution to the preparation or submission of this brief.

The statutory limits on coordinated expenditures reflect Congress' unique understanding of the interests at stake in political finance, and balance rights of expression and association with the need to preserve the integrity of the political process. The balance Congress struck is entitled to deference. At the hands of the Tenth Circuit panel majority below, it received no such deference.

Finally, while the limits on coordinated expenditures are needed to fight corruption and the appearance of corruption, these are not the only threats to the integrity of the political system at issue here. Political integrity also depends on preserving the right of all citizens to participate equally in the political process, regardless of wealth. The government must have—and, consistent with this Court's precedent, does have—the ability to ensure that this principle of equal and meaningful participation in the political process is vindicated.

ARGUMENT

I. COORDINATED EXPENDITURES ARE *DE FACTO* DIRECT CONTRIBUTIONS THAT CONGRESS RECOGNIZED MUST BE LIMITED TO AVOID UNDERCUTTING EXISTING LIMITS ON DIRECT CONTRIBUTIONS

Political campaigns, by and large, are bankrolled by an elite group of wealthy donors. Nearly two-thirds of the "hard money"[2] raised during the first 18 months of the 2000 election cycle by federal campaigns and parties came from

[2] Hard money—money regulated under FECA and contributed for the specific purpose of electing certain candidates or defeating others—remains the lifeblood of political campaigns. For every dollar of "soft money" (i.e., unregulated money ostensibly contributed for party-building and voter registration) raised by parties in the 2000 federal elections, nearly five hard dollars were raised by parties and federal candidates. *See* Public Campaign, Press Release, HARD FACTS: HARD MONEY IN THE 2000 ELECTION (Oct. 31, 2000), *at* http://www.publicampaign.org/press_releases/ pr10_31_00.html.

special interest PACs and individuals who gave $200 or more.[3] Hard money contributors who gave more than $200 in the 1996 election comprised one-quarter of one percent of the population of the United States.[4]

These wealthy donors—who constitute a tiny fraction of the United States population—enjoy personal access to candidates that nearly all other voters do not.[5] This unseemly situation exists *despite* the existing regime of limits on contributions and party-candidate coordinated expenditures.[6]

Though far from perfect, to some degree the existing limits on campaign finance do cabin the role, and unfair preeminence, of wealth in American politics. As shown *infra*, these limits should not be eroded. Affirming the Tenth Circuit's decision to strike down the limits on coordinated expenditures would do so.

[3] *See* Public Campaign, Report, HARD FACTS: HARD MONEY IN THE 2000 ELECTION (Oct. 2000), *at* http://www.publicampaign.-org/hardmoney.html.

[4] *See id.* According to analysis by the Center for Responsive Politics of FEC figures, as of November 1, 2000, the number of persons who contributed $1,000 or more in hard money to parties stood at a mere 36,859, which is roughly *one-hundredth of a percent* of the United States' population. *See* Center for Responsive Politics, *Analysis of Hard Money Contributions to Political Parties for the 2000 Election Cycle* 1 (Nov. 28, 2000) (on file with the Center for Responsive Politics).

[5] A study conducted two years ago surveying individuals who contributed more than $200 to federal candidates revealed that the overwhelming majority of large contributors report personal communication with officeholders they support, often concerning their jobs and businesses. John Green *et al.*, Joyce Found. of Chicago, INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE—AND REFORM MINDED (1998) (also finding that 95% of large contributors were white, and 81% were white males).

[6] Just over a thousand people gave the maximum amount of $20,000 in hard money allowed under federal law to political parties. *See* Center for Responsive Politics, *Analysis*, *supra* note 4, at 1.

A. Coordinated Expenditures Are Direct Contributions

Limitations on direct contributions to candidates have been upheld under constitutional scrutiny, *see Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976), and FECA treats expenditures made by most persons in coordination with candidates as though they were direct contributions from the person. *See* 2 U.S.C. § 441a(a)(1)(A), (2)(A), and (7)(B)(i). The reason is straightforward: if a would-be contributor can instead simply pick up the tab for all of the candidate's expenses, then limits on the amount of direct contributions become meaningless. Under the FECA provision challenged here, § 441a(b)(3), political parties can make coordinated expenditures (i.e. contributions) that are much larger than those allowed by FECA for ordinary persons. Thus, FECA's structure already assures that political parties have a favored status with respect to political contributions.

Though FECA regulates so-called "hard money" contributions to parties that are "earmarked" for the election of certain candidates or the defeat of opponents, "soft money" donations for party-building and other activities are unregulated and unlimited. In this environment, unlimited coordinated expenditures create back-channels—illicit, perhaps, but difficult to police—for harnessing soft money in ways that accomplish hard money objectives while avoiding hard money restrictions. As Congress recognized, the ability of (and pressure upon) parties "to funnel large amounts into the campaigns of particular candidates in response to large donations by outside interests" threatened to turn unlimited coordinated expenditures into an easily-exploitable loophole for the evasion of contribution limits.[7] *FEC v. Colorado*

[7] Even putatively "independent" party expenditures may not be very independent. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 648 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) (arguing that all money spent by parties on behalf of candidates, including independent expenditures, should be considered contributions to the candidate); Archibald Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395, 410 (1982) ("Wherever gratitude for the past or fear that the money may not be forthcoming in the future is enough to influence official action, little will turn upon whether the financial help takes the form of a contribution or a so-called independent expenditure . . . .").

Republican Fed. Election Comm., 213 F.3d 1221, 1240 (10th Cir. 2000) (Seymour, J., dissenting). Savvy contributors, with the benefit of unlimited coordinated expenditures and the right amount of winking and nodding, can cause donations to pass to the intended candidate. And, as Congress recognized, such problems are most effectively solved through prophylactic measures such as coordinated expenditure limits; regulations devised to directly interdict influence peddling (e.g., FECA provisions treating donations to parties "earmarked" for particular candidates as contributions) simply give rise to sophisticated but effective evasion. *See id.* at 1241 (Seymour, J., dissenting) (record reveals that "earmarking" prohibition "is circumvented through 'understandings' regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote."); *cf. Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 908 n.7 (2000) (bribery statutes inadequate to effectively address the problem of corruption).

B. Limits On Coordinated Expenditures Reflect Congress' Understanding Of The Intricacies Of Political Finance

Limits on campaign contributions and expenditures are often portrayed by their detractors as black-and-white examples of censorship of political speech. This analysis is grossly oversimplified; though political contributions may

implicate constitutionally protected rights of speech[8] and association, campaign finance limits also secure and maintain the integrity of the political process, a constitutionally-protected interest in its own right. *See Shrink Missouri*, 120 S. Ct. at 911 (Breyer, J., concurring).

Congress' keen understanding of the need to prevent wealth from having a predominant and undue role in political speech and political participation formed the basis for the appropriate prophylactic limits on coordinated expenditures at issue in this case. *See Colorado Republican*, 213 F.3d at 1243 (Seymour, C.J., dissenting). Neither *Buckley* nor subsequent cases counsel the sort of flamboyant second-guessing of legislative decisionmaking exhibited by the panel majority. Courts should defer to Congress' empirical determination that limits on *laissez faire* campaign finance will protect the overall health and integrity of the political process. *See Shrink Missouri*, 120 S. Ct. at 912-13 (Breyer, J., concurring); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 268-70 (1986) (Rehnquist C.J., dissenting); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting); *cf. Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 109-208 (1997); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 684-86 (1966) (Harlan, J., dissenting); *see also Colorado Republican*, 213 F.3d at 1237 (Seymour, C.J., dissenting) (majority's opinion "replete with instances in which Congressional assessments and priorities are criticized and disregarded").

Nevertheless, neither the District Court nor the panel majority paid proper consideration to the evidence supporting Congress' decision to restrict coordinated expenditures.

[8] This position is not without controversy; *see Shrink Missouri*, 120 S. Ct. at 910 (Stevens, J., concurring); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1004 (1982) (money "registers intensities" but in itself "communicates no ideas.").

Compare Colorado Republican, 213 F.3d at 1228, 1231 (majority opinion) (relying on academic works and jokes about sanitary engineers) *with id.* at 1240-42 (Seymour, C.J., dissenting) (citing affidavits, congressional testimony, media articles and interviews ignored by majority) *and Shrink Missouri*, 120 S. Ct. at 906 (affidavits, media accounts, and voting records clearly outweighed disputed academic texts).[9] Most egregious, perhaps, was the panel majority's effort to instruct Congress on the true nature and role of political parties in American politics, *see Colorado Republican*, 213 F.3d at 1231 (majority opinion); *id.* at 1243 (Seymour, C.J., dissenting) (*"As a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics"*) (emphasis in original).[10]

II. THE PRINCIPLE OF POLITICAL EQUALITY PROVIDES A LEGITIMATE BASIS BEYOND THAT OF PREVENTING CORRUPTION FOR UPHOLDING LIMITS ON COORDINATED EXPENDITURES

Seizing on language in *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), the Court of Appeals panel's majority opinion erroneously implies that corruption (real or

[9] In a November 1996 Pew Research Center survey of 1,204 Americans, 53% of them considered the "power of special interest groups in politics" to be a "threat to the nation's future." Only international terrorism garnered a higher percentage of responses (54%). Pew Research Center, *Politics, Morality, Entitlements Sap Confidence—The Optimism Gap Grows* (Jan. 17, 1997), *at* http://www.people-press.org/unionrpt.htm.

[10] The majority, in a footnote, contended that its lecture on the role of political parties was intended for the FEC, not Congress, *see Colorado Republican*, 213 F.3d at 1231 n.7; the explanation is hardly convincing given that § 441a(d)(3) is a *statute*, not an FEC rule. Even if convincing, it seems no more appropriate to lecture the FEC than Congress on this subject.

perceived) is the *only* "constitutionally sufficient justification" for limiting political donations or coordinated expenditures. *See Colorado Republican*, 213 F.3d at 1227. Without doubt, preventing corruption, or the appearance of corruption, from taking hold in the electoral process on its own is a sufficient justification for reversing the decision below. Nevertheless, any examination of contribution limits must also consider another treasured value of our democratic system -- equality.[11] Political equality is "the cornerstone of American democracy,"[12] and the overarching principle which constitutional liberties must serve. *See* John Rawls, POLITICAL LIBERALISM 356-63 (1993).

As the FEC persuasively argued below, the limits on coordinated expenditures at issue in this case were enacted to address a grave threat to the integrity of the electoral process that centers on the specter of corruption. However, limits on coordinated expenditures not only reduce the risk of corruption but also have a deeper resonance in democratic theory. As legislatures and this Court have recognized, corruption looms when vast wealth, amassed without popular support, threatens to dominate the political process. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quoting *Massachusetts Citizens for Life*, 479 U.S. at 258). In other words, the root of corruption lies in political inequality, where undue advantages are accorded based on wealth. As Justice Breyer has written, restrictions on

[11] *National Conservative PAC* does not foreclose other justifications for limits on contributions and coordinated expenditures. In that case, the Court reaffirmed that preventing corruption was a legitimate and compelling interest, adding that it was the only "*compelling* interest *thus far identified*." *National Conservative PAC*, 470 U.S. at 496-97 (emphasis added).

[12] J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625 (1982).

contributions "aim to democratize the influence that money itself may bring to bear on the electoral process." *Shrink Missouri*, 120 S. Ct. at 911 (Breyer, J., concurring); *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting) ("Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns.").

Removing the restrictions on coordinated expenditures opens a loophole in the constitutionally acceptable framework of limiting direct contributions that would corrode the principle of equal participation—regardless of affluence—in the political process. *Amicus* submits that every citizen should be able to cast an effective vote, run for office, and add his or her voice to the national political discourse without having to be wealthy to do it.

More than thirty years ago, in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), this Court laid to rest the notion that a citizen's wealth (or lack thereof) ought to qualify (or prevent) her from exercising the franchise. The right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *See Bullock v. Carter*, 405 U.S. 134 (1972). In *Bullock*, the Court struck down filing fees for Texas's local elective office primaries that were prohibitively high—so high that candidates without sizable war chests were effectively precluded from running. The Court noted that it had not until then regarded restrictions that hindered candidates with the same level of scrutiny that it had applied to restrictions on the franchise, but concluded that stringent scrutiny was appropriate because the high cost of running in the primaries would limit voter choice. Particularly, the Court noted that high primary costs would prevent under-financed candidates, who might conceivably be favored by less-wealthy voters, from running. *See id.* at 142-44; *see also Lubin v. Panish*, 415 U.S 709, 717-18 (1974).

While few would discredit the importance of wealth-blind political equality to our system of government, the efforts of government to vindicate that goal have not gone unquestioned, particularly when those efforts take the form of limits on contributions and expenditures in political campaigns that have resulting effects on political speech. In particular, *Buckley* flatly states that the government cannot "restrict the speech of some . . . in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49. But, as Justice Breyer has stated, "those words cannot be taken literally." *Shrink Missouri*, 120 S.Ct. at 912 (Breyer, J., concurring); *see* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994) (proposition "demonstrably false").[13] "It is one thing

[13] Among other things, the health and vitality of the political process depends upon the public having access to a wide range of political opinions and views. This proposition is central to democratic politics and the core of the First Amendment itself. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (public discussion and informed deliberation are both the prerequisite for and achievement of democratic government and the First Amendment). Ensuring public access to a multiplicity of information sources is a government interest of the "highest order." *Turner Broadcasting System*, 520 U.S. at 190. Indeed, the animating purpose behind the protections of the First Amendment has been to secure a *system*—not just a conglomeration of individual rights of expression and association—in which a diversity of opposing and contradictory views would be publicly available. *See Bellotti*, 435 U.S. at 783 (First Amendment protects against limitations on "the stock of information" available to the public); *id.* at 804-12 (White, J., dissenting) (locating First Amendment interest in preventing corporate domination of political speech); *Associated Press v. United States*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.) (First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.")).

Buckley should not be read to prohibit regulation aimed at preventing affluence, detached from broad popular support, from *dominating* the electoral process. *See Bellotti*, 435 U.S. at 809-11 (White, J., dissenting). Furthermore, reversing the panel majority's decision in this case would

to say that government cannot silence some in order to amplify the views of others in the open marketplace of ideas, and quite another to insist that, in the arguably zero-sum 'marketplace' of electoral influence, where amplifying the reach and impact of some voices necessarily reduces that of their opponents, government cannot reduce the clout of some in order to advance the goal of equalizing influences of election outcomes." Laurence Tribe, AMERICAN CONSTITUTIONAL LAW § 13-29 at 1141 n.2 (2d ed. 1988). Indeed, before and after *Buckley* and in contexts political and otherwise, this Court has upheld government measures that limit or dilute the intensity of one voice, or a few voices, to keep them from drowning out others. *See Shrink Missouri*, 120 S. Ct. at 912 (Breyer, J., concurring); *Turner Broadcasting Systems*, 520 U.S. at 192-93 (upholding Cable Act "must carry" provision and rejecting cable operators' argument that a "rump broadcasting industry" would satisfy the government interest in ensuring the "widest possible dissemination of information from diverse and antagonistic sources" (internal quotations omitted)); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980) (state law allowing pamphleteers in private shopping mall did not infringe disagreeing mall owner's First Amendment rights); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969) (upholding FCC rebuttal requirement for broadcast personal attacks and political editorials). *See also* Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 10-11 (1948) (some regulation of political speech necessary for the orderly presentation and intelligent deliberation self-government requires). The absolutist position that political

not have a substantial effect on the amount or quality of political speech; even under the coordinated expenditure limits, parties (and their benefactors) remain free to make essentially unlimited independent expenditures. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

equality is a laudable goal that government can nonetheless never pursue, encouraged by some unfortunate and inaccurate language in *Buckley*, is simply wrong.

CONCLUSION

In short, unlimited coordinated expenditures would short-circuit contribution limits and allow the influence peddling that those limits suppress to flourish once again.[14] Removing such limits would only magnify the importance to political parties of the tiny, unrepresentative fraction of citizens able to donate the largest sums to parties. *See supra* at 2-3. Unlimited coordinated expenditures would thus be destructive to the principle that no one is entitled to "more" or "multiple" representation in our democracy. *See generally* Marlene Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974). The coordinated expenditure limits at issue here are in keeping with this principle, ensuring that party assistance represents "'the involvement of many voters and not merely the influence of a wealthy few.'" *Colorado Republican*, 213 F.3d at 1238 (Seymour, C.J., dissenting) (quoting S. Rep. No. 93-689 (1974).

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[14] Indeed, even with existing limits on contributions and coordinated expenditures in place, monied interests, using "bundled" or coordinated donations and other strategems, still exert overmuch influence on the electoral process. *See* Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-42 (1994); Jamie Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 326-27 (1993); *see also* note 5, *supra*. Eliminating coordinated expenditure limits would simply make matters worse.

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